87-477

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALBERT J. FERENS & MARGARET L. FERENS, His Wife
Petitioners

v.

DEERE & COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Where there are sufficient minimal contacts for a state to exercise jurisdiction over a defendant foreign corporation, can a United States District Court that is a transferee forum under 28 U.S.C. 1404(a) refuse to apply the procedural rules of that transferor state, including its statute of limitations, on the ground that applying the transferor state's procedural rules violates the due process and full faith and credit clauses, where such a holding contravenes the holdings of the highest state and federal courts of the transferor state?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURSIDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) . 7, 8, 9

Chase Securities Corp., v. Donaldson, 325 U.S. 304 1945) 12, 13

Cowan v. Ford Motor Co., 694 F. 2d 104 (5th Cir. 1982) *[Cowan I]* 7, 9

Cowan v. Ford Motor Co., 714 F. 2d 100 (5th Cir. 1983) *[Cowan II]* 7, 9, 10

Cowan v. Ford Motor Co., 719 F. 2d 785 (5th Cir. 1983) *[Cowan III]* 7, 9

Cummings v. Cowan, 300 F. Supp. 1251 (N.D. Miss. 1975) 8, 15

Davis v. Mills, 194 U.S. 451 (1904) 15

Davis v. National Gypsum, 743 F. 2d 1132 (5th Cir. 1984) 8

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1934)..... 11

Ex Parte Schollenberger, 96 U.S. 369 (1877)..... 6

Fieldman v. Roper Corp., 586 F. Supp. 936 (S.D. Miss. 1977) 8, 15

Goad v. Celotex Corp., et. al. No. 86-3540 (4th Cir.).... 10

Great Western Tel. Co. v. Purdy, 162.U.S. 329 (1869)... 12

Hamilton v. Cooper, 1 Miss. (Walker) 542 (1832)..... 14

Headrick v. Atchison, T. & S.F.R. Co., 182 F. 2d 305 (10 Cir. 1950) 7

Home Insurance Co., v. Dick, 281 U.S. 397 (1930)... 8, 9, 12

Hyde Construction Co. v. Koehring Co., 387 F. Supp. 702 (S.D. Miss. 1974)..... 8

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984)...8, 14

Loughan v. Firestone Tire and Rubber Co., 624 F. 2d 726 (5th Cir. 1980) 9

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Louisiana & Mississippi R. Transfer Co. v. Long, 159 Miss. 654 (1930) 7, 9

McVicar v. Standard Insulations, Inc., No. 86-3398 slip. op. (11th Cir. Aug. 19, 1987) 10

M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839) 11, 12

Neirbo Co. et al. v. Bethlehem Shipbuilding Corp., 308 U.S. 153 (1939) 6

Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 11

Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586 (1947) 12

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1951) 13

Phillips Petroleum v. Shutts, ___ U.S. ___, 105 S. Ct. 2965 (1989) 13

Ramsay v. Boeing Co., 432 F. 2d 593 (5th Cir. 1970) 8

Schreiber v. Allis-Chalmers Corp., 611 F. 2d 790 (10 Cir. 1979) 8, 10

Van Dusen v. Barrack, 376 U.S. 612 (1964) 6, 7

Vick v. Cochran, 316 So. 2d 242 (Miss. 1975) 8

Wells v. Simonds Abrasive Co., 364 U.S. 514 (1953) 12

White v. Malone Properties, Inc., 494 So.2d 576 (Miss. 1986) 15

World-Wide Volkswagon Corp., v. Woodson, 444 U.S. 286 (1980) 13

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. XIV 4

U.S. Const. Article IV §1 4

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

STATUTES, RULES AND REGULATIONS:

28 U.S.C. 1254(1) 3

28 U.S.C. §1332 6

28 U.S.C. §1404(a) 4, 6, 7, 9, 10

42 Pa. Cons. Stat. Ann. §5524(2) (Purdon 1981) 4, 6

Miss. Code Ann. §2669 (1880) 14

Miss. Code Ann. §2737 (1892) 14

Miss. Code Ann. §3097 (1906) 14

Miss. Code Ann. §2461 (1917) 14

Miss. Code Ann. §2292 (1930) 14

Miss. Code Ann. §722 (1942) 14

Miss. Code Ann. §15-1-49 (1972) 4, 6, 14

Miss. Code Ann. §15-1-65 (1972) 9

Miss. Code Ann. §79-1-27 ..... 4-5, 6

Miss. Code Ann. §79-1-229 6

Miss. Code Ann. §79-3-229 3

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Petitioners

v.

DEERE & COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Albert J. Ferens and Margaret L. Ferens, his wife, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for Third Circuit entered on May 28, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 819 F.2d 423 (3rd Cir. 1987) and appears in the Appendex hereto at A-1. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 639 F. Supp. 1484 (W.D. Pa. 1987) and appears in the Appendix hereto at A-17.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit, entered on May 28, 1987, affirms dismissal of actions based on theories of negligence and strict liability. The Court of Appeals denied a timely petition for rehearing and rehearing en banc on July 9, 1987, which appears in the Appendix hereto at A-33. This petition for certiorari was filed within ninety (90) days of that date. Although the Court of Appeals denied a motion to stay the mandate (A-34), an appeal to this Court is not precluded by that denial.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the Constitution provides in pertinent part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

Article IV §1 of the Constitution provides:

> Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other state.

28 U.S.C. §1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Miss. Code Ann. §15-1-49 (1972) provides:

> All actions for which no period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

42 Pa. Cons. Stat. Ann. §5524 (Purdon 1981) provides in pertinent part:

> The following actions and proceedings must be commenced within two years:
>
> * * *
>
> (2) an action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence of another.

Miss. Code Ann. §79-1-27 provides:

> Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to

> suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not.

Miss. Code Ann. §79-3-229 provides in pertinent part:

> The registered agent so appointed by a foreign corporation authorized to transact business in this state shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served.

STATEMENT OF THE CASE

On July 5, 1982, while cleaning a combine manufactured by respondent, petitioner Albert J. Ferens was injured. The accident occurred in Pennsylvania. Petitioner was a Pennsylvania resident, and he purchased his combine in Pennsylvania. Respondent is a Delaware Corporation with its principal place of business in Illinois. Respondent, however, does business in Mississippi and has a registered office in Mississippi, where it accepts service of process. Pursuant to Miss. Code Ann. §79-1-27 and §79-1-229, respondent has submitted to the jurisdiction of Mississippi courts. *Neirbo Co. et al. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 153 (1939); *Ex Parte Schollenberger*, 96 U.S. 369 (1877). On July 3, 1985, the petitioners filed an action in the United States District Court for the Western District of Pennsylvania, alleging breach of express and implied warranties of merchantability and fitness for use, for which the statute of limitations is four years. On July 25, 1985, the petitioners filed an action for the same injuries in the United States District Court for the Southern District of Mississippi under the doctrines of negligence and strict liability. The Mississippi statute of limitations for such actions is six years. Miss. Code Ann. §15-1-49 (1972). That action, while viable in Mississippi, was barred in Pennsylvania by Pennsylvania's two year statute of limitations. 42 Pa. Cons. Stat. Ann. §5524(2) (Purdon 1981). After respondents filed an answer to the Mississippi Complaint, the petitioners moved for transfer to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a).[1] The District Court for the Southern District of Mississippi then transferred the action to the Western District of Pennsylvania on forum non conveniens grounds under 1404(a).

Respondent moved for summary judgment on the negligence and strict liability claims, asserting that they were barred by Pennsylvania's two year statute of limitations, 42 Pa. Cons. Stat. Ann. §5524(2) (Purdon 1981). Respondent made this argument despite this Court's holding in *Van Dusen v. Barrack*,

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1. Jurisdiction in the Southern District of Mississippi was based on 28 U.S.C. §1332, diversity of citizenship.

376 U.S. 612 (1964) that a transferee district court must apply the state law that would have been applied if there had been no change of venue and despite the clear authority that a Mississippi court would apply the six-year statute of limitations. *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654 (1930); *Cowan v. Ford Motor Co.*, 694 F. 2d 104 (5th Cir. 1982) [*Cowan I*]; *Cowan v. Ford Motor Co.*, 714 F. 2d 100 (5th Cir. 1983) [*Cowan II*]; *Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983) [*Cowan III*]. Indeed, this Court, in *Van Dusen v. Barrack, supra*, explicitly approved of *Headrick v. Atchison, T. & S.F.R. Co.* 182 F.2d 305 (10th Cir. 1950), where the forum state's statute of limitations applied after the case was transferred under 1404(a) to a jurisdiction with a shorter statute. The District Court granted respondent's summary judgment motion, citing language in *Van Dusen v. Barrack, supra* that held open the possibility of not applying the law of the transferor state if the plaintiff, as opposed to the defendant, seeks transfer under 1404(a).[2] The Court of Appeals sustained the summary judgment ruling but did so on Constitutional grounds. It held, purportedly following *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), that where an action had insufficient contacts with a forum, the application of the forum state's statute of limitations violated the due process and full faith and credit clauses of the Constitution. The Court of Appeals found support in a footnote in *Van Dusen v. Barrack, supra*, which reads:

> We do not suggest that the application of transferor state law is free from constitutional limitations. See, e.g., Watson

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2. The Court stated in *Van Dusen v. Barrack, supra*:

> In so ruling, however, we do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee state. *We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a).* [Emphasis supplied].

Id., at 639-640.

Contrary to *Van Dusen v. Barrack*, the Court of Appeals for the Third Circuit rejected application of the Mississippi statute even when the defendant moves for transfer.

v. Employers Liability Insurance Corp., LTD, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74; Hughes v. Fetter, 341 U.S. 609, 71 S.Ct., 95 L.Ed. 1212; Pacific Employers Ins. Co. v. Industrial Accident Comm'n, etc., 306 U.S. 493, 59 S.Ct. 629, 83 L. Ed. 940; Alaska Packers Assn. v. Industrial Accident Comm'm, etc., 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044; Home Ins. Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926.

Id., at 639, n. 41.

The Honorable Collin J. Seitz strongly dissented. Judge Seitz argued that the majority ignored the distinction between the Constitutional limitations on a forum's choice of substantive law, which governs conduct, and a forum's application of its procedural law. *Allstate Insurance Co. v. Hague*, *supra* and the Court of Appeal's other main support, *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), explicitly apply the Constitution only to a forum's choice of substantive law. Judge Seitz also observed that this Court has declined to decide whether a forum's choice of its statute of limitations could rise to a due process violation.[3] The Court of Appeals took what might be called an "activist" position, elevating to a Constitutionally mandated rule what is properly a legislative matter.[4]

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3. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n. 10 (1984), the Court stated:

> Under traditional choice-of-law principles, the law of the forum State governs on matters of procedure. In New Hampshire, statutes of limitations are considered procedural. There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and litigation. But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation. [Citations omitted.]

As in New Hampshire, Mississippi statutes are considered procedural. *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975). *Schreiber v. Allis-Chalmers Corp.*, 611 F. 2d 790 (10th Cir. 1979); *Davis v. National Gypsum*, 743 F. 2d 1132 (5th Cir. 1984); *Fieldman v. Roper Corp.*, 586 F. Supp. 936 (S.D. Miss. 1977); *Ramsay v. Boeing Co.*, 432 F. 2d 593 (5th Cir. 1970); *Cummings v. Cowan*, 300 F. Supp. 1251 (N.D. Miss. 1975); *Hyde Construction Co. v. Koehring Co.*, 387 F. Supp. 702 (S.D. Miss. 1974).

4. The Court of Appeals reached its decision sua sponte.

REASONS FOR GRANTING THE WRIT

A.

The decision of the Third Circuit Court of Appeals is in conflict with the decisions of other federal appellate courts. The Court of Appeals for the Fifth Circuit explicitly held in *Cowan I*, *supra* at 107, in conformity with Judge Seitz's dissent in the instant case, that application of Mississippi's six-year statute, being procedural, does not violate the due process and full faith and credit clauses as interpreted by *Home Insurance Co. v. Dick*, *supra* and *Allstate Insurance Co. v. Hague*, *supra*. In *Cowan*, the accident occurred in Texas, where the plaintiff and her deceased, injured husband were residents. The defendant, like the instant defendant, was not a Mississippi resident but conducted business in Mississippi and appointed an agent for service of process in Mississippi. The Court of Appeals for the Fifth Circuit further held in *Cowan II*, *supra* that, upon transfer pursuant 28 U.S.C. 1404(a), the Mississippi statute of limitations would apply. The Fifth Circuit affirmed that decision in *Cowan III*, *supra* after certifying to the Mississippi Supreme Court the question of whether Mississippi's "borrowing statute," Miss. Code Ann. §15-1-65 (1972), would bar the plaintiff's suit.[5] The Court of Appeals for the Fifth Circuit also held in *Loughan v. Firestone Tire and Rubber Co.*, 624 F.2d 726 (5th Cir. 1980) that the initial forum's longer statute of limitations will apply following transfer under 28 U.S.C. §1404(a). In that case, the suit was originally filed in Ohio, where the defendant maintained its principal place of business. The tort occurred in Florida, where plaintiff was also a resident, where he was employed, and where he received medical treatment. The case was transferred to Florida, where the Court of Appeals ultimately held that the Ohio statute applied.

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5. The Mississippi Supreme Court opinion, appended to the published opinion of *Cowan III*, indicates that the borrowing statute is not to be interpreted to require application of a foreign state's statute of limitations under the facts of *Cowan* or the instant case. See also *Louisiana & Mississippi R. Transfer Co. v. Long*, *supra*.

Similarly, the United States Court of Appeals for the Eleventh Circuit recently held in *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987) that the longer Mississippi statute would apply following a transfer under 27 U.S.C. §1404(a) to federal court in Florida. The United States Court of Appeals for the Tenth Circuit held likewise in *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979) following transfer to federal court in Kansas. Plaintiff in that case was a resident of Kansas and was injured while working for the defendant in Kansas. The defendant was licensed to do business in Mississippi and had a manufacturing plant in Mississippi. The issue of whether the statute of limitations can follow an action transferred under 28 U.S.C. 1404(a) without violating the Constitution is also on appeal in the United States Court of Appeals for the Fourth Circuit in *Goad v. Celotex Corp., et. al.* No. 86-3540.

The conflict created by the decision of the Court of Appeals for the Third Circuit raises significant problems within the federal court system. The Third Circuit, while holding that a Mississippi Court's application of the Mississippi statute is unconstitutional unless there is something more than the minimal contacts necessary for jurisdiction, is not a binding authority for either Mississippi state or federal courts. When a case identical to the instant case is filed in Mississippi, the Mississippi courts will apply the Mississippi statute of limitations and not follow the Third Circuit. Indeed, the Fifth Circuit Court of Appeals, which is binding authority for Mississippi federal courts, is in direct conflict with the Third Circuit Court of Appeals. *Cowan I* at 107.[6] If a motion to transfer under 28 U.S.C. 1404(a) is filed, Mississippi courts will deny the motion or transfer only to district courts in the Fifth, Eleventh, or Tenth Circuits.[7] If a Mississippi court does indeed transfer a

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6. The intent of Mississippi courts to apply the six-year Mississippi statute is also evident in the Mississippi transfer orders, which direct the transferee forum to apply the six-year statute. See, for example, the transfer order appended hereto at A-35.

7. The *Cowan II* court observed that transfer under 28 U.S.C. 1404(a) superceeded the common law forum non conveniens doctrine of dismissal. The

case to a district court within the Third Circuit, the outcome will be inconsistent with the outcome of identical cases transferred to the Fifth, the Eleventh, the Tenth, and possibly other Circuits. The problem, moreover, is not confined only to cases initially filed in Mississippi, but involves cases filed in any state where plaintiffs can enjoy the benefit of a relatively long statute of limitations. This conflict among the circuits undermines the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1934), whereby a federal court sitting in diversity must apply the law of a forum state in order to achieve the same result as the state court. It also undermines the objective of uniformity within the federal system in that transferee courts will be treating identical cases differently from transferor federal courts.

B.

The Court of Appeals decision, in addition to creating a conflict within the circuits, is inconsistent with a line of cases in this Court holding that the statute of limitations is set by the forum. As long ago as *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839), this Court stated that it was "well settled" that statutes of limitations were a matter of remedy "and consequently that the lex fori must prevail." The Court reasoned that a statute of limitations:

> is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.

Although the fourteenth amendment due process clause, unlike article IV's full faith and credit clause, was not part of the

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common law doctrine was replaced, being overly harsh. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). The ruling of the Court of Appeals for the Third Circuit would have the effect of reinstating the common law doctrine. Once a case was transferred to the Third Circuit on forum non conveniens grounds, it would be dismissed.

Constitution at the time of *M'Elmoyle*, the rule has been consistently accepted since adoption of the amendment.

For example, in *Great Western Tel. Co. v. Purdy*, 162 U.S. 329, 339 (1869), the Court, citing *M'Elmoyle*, stated:

> The limitations of actions is governed by the lex fori, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions.

In *Home Insurance Co., v. Dick, supra*, which the Court of Appeals for the Third Circuit misconstrued, this Court noted that "in the absence of contractual provisions, the local statute of limitations may be applied to a right created in another jurisdiction even where the remedy in the latter is barred." In *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 607-09 (1947), this Court again recognized that the rule was "well established" and Constitutional. In *Wells v. Simonds Abrasive Co.*, 364 U.S. 514, 516-17 (1953), the Court several times reaffirmed its prior approval of "the well-established rule that the forum state is permitted to apply its own period of limitations." The rule that a forum state's limitations statute applies has been long recognized and should not be deemed offensive to the concepts of federalism and fairness that the two Constitutional provisions at issue protect.[8]

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8. Statutes of limitations are traditionally matters of policy established by the legislature after weighing the state's interest in eliminating stale claims and the interest in repose against the interest in vindicating legal rights and responsibilities. Even if there are policy reasons for requiring a Pennsylvania resident injured in Pennsylvania who files in Mississippi to bring suit within the Pennsylvania limitations period, it does not follow that bringing suit within that period is Constitutionally mandated. Limiting the application of the Mississippi statute is a matter for legislatures, and there is no ground for a judicially established rule.

There is no fundamental right not to be sued after a certain limitation period. As the Court observed in *Chase Securities Corp. v. Donaldson*, 325 U.S 304, 314 (1945):

The ruling of the Court of Appeals for the Third Circuit runs contrary not only to this Court's prior decisions but also to its numerous decisions on personal jurisdiction. This Court has explained that one purpose of the minimum contracts requirement is protecting a defendant against the burden of litigating in a distant or inconvenient forum. *World-Wide Volkswagon Corp., v. Woodson*, 444 U.S. 286, 292-293 (1980). *Phillips Petrolem v. Shutts*, ___ U.S. ___, 105 S. Ct. 2965, 2973 (1989). The minimum contact requirement embodies a concern for reasonableness and fairness to defendants. *Id.* A corporation purposefully availing itself of the privilege of conducting activities within a state has clear notice that it is subject to suit there and can thereby alliviate the risk of litigation. *World-Wide Volkswagon Corp. v. Woodson*, *supra* at 198. This Court has sustained the exercise of jurisdiction over a foreign corporation no longer conducting any activities in the forum for a cause of action that did not arise in the forum. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1951). Thus, the Third Circuit has held that while there may be sufficient jurisdictional contacts — enough contacts to satisfy standards of fairness and reasonableness and to place a defendant on notice that he may be sued in a particular forum — the contacts could be insufficient to permit the forum state to apply its own procedural law. That due process could be satisfied for jurisdictional purposes but not for purposes of applying a forum state's procedural law is incongruous. If it does not offend due process for a corporation

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> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [citation omitted] They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. (footnote omitted.)

Chase Securities Corp., v. Donaldson, 325 U.S. at 314.

to be hailed into court in a state where it has a registered agent to accept service of process, it could not offend due process for that corporation to submit to the procedural rules, including the statute of limitations, of that state.

C.

The Court of Appeals decision is, finally, offensive to the full faith and credit clause and to state sovereignty. It has the effect of imposing the rules of a foreign jurisdiction on the courts and territory over which Mississippi, or another similarly situated state, is sovereign. Under the Court of Appeals' ruling, the sovereignty of each state is threatened to the extent that another jurisdiction has greater contacts with the cause of action or the defendant.[9] The Constitution has never before been interpreted to impose a choice of law principle on states whereby they must mold their judicial procedures to those of the state with the greatest contacts.[10] So long as a state is not attempting to

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9. The six-year statute of limitations has been accepted in Mississippi for over 150 years and has been repeatedly reaffirmed by the Mississippi legislature during that time. The Code section in question was first adopted in the year 1880. In 1880, the Code section number was 2669. The statute was re-enacted in the Codes of 1892 (§2737); 1906 (§3097); Hemmingway's 1917 (§2461); 1930 (§2292); 1942 (§722) and 1972 (§15-1-49).

Thus, the Mississippi legislature has repeatedly reenacted the statute, most recently in the laws of 1972. Its approval on April 26, 1972 post-dates the interpretation repeatedly placed upon this statute by Mississippi Courts.

The most recent attempt to change Miss. Code. Ann. §15-1-49 (1972) is reflected in House Bill 454 introduced in 1986. House Bill 454 was voted down by a substantial majority of the committee and not reported out of committee. A Senate Bill identical to the House Bill was also defeated.

That same bill has been introduced every year for the last several years and has been rejected by the legislature in each instance. So the legislature has not only re-adopted their statute as interpreted by courts for over 150 years (see *Hamilton v. Cooper*, 1 Miss. (Walker) 542 (1832)), but it has affirmatively refused to change it.

10. Instead, plaintiffs are expected to take advantage of favorable law in any proper jurisdiction, and corporate defendants are deemed to be cognizant of the laws of jurisdictions where they have minimum contacts. As this Court stated in *Keeton v. Hustler Magazine, Inc.*, *supra*:

Petitioner's successful search for a State with a lengthy statute of

regulate out-of-state conduct by its choice of *substantive* law in violation of the Constitution and so long as it has jurisdiction over the parties, full faith and credit does not require that it recognize another jurisdiction's procedure. Mississippi has made the policy decision to keep its courts open to a cause of action for a longer period than Pennsylvania, and so long as business entities commiting torts are subject to Mississippi's jurisdiction, Mississippi's limitations statute deserves the full faith and credit of states incorporating those business entities, states housing their headquarters, and states where plaintiffs are injured.[11]

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limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations. Certainly Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner.

Id. at 780.

11. To the extent Pennsylvania wanted its two-year limitations period to apply to causes of action arising under its substantive law, its legislature could have conditioned the substantive right on bringing suit within two years as opposed to conditioning the remedy on filing within two years. Binding the limitations period to the underlying right would have caused the period to be treated as part of the substantive law and thus not subject to the forum's statute of limitations. *Davis v. Mills*, 194 U.S. 451, 453-454 (1904); *White v. Malone Properties, Inc.*, 494 So.2d 576 (Miss. 1986); *Fieldman v. Roper*, 586 F. Supp. 936, 938 (S.D. Miss. 1977); *Cummings v. Cowan*, 300 F. Supp. 1251, (N.D. Miss 1975). The Pennsylvania legislature chose not to frame its statute in this way.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered on July 9, 1987.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

DEERE & COMPANY,

(D.C. Civil No. 85-1534)

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY

(D.C. Civil No. 85-2725)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Argued: March 5, 1987
Before: GIBBONS, *Chief Judge* and SEITZ
and ALDISERT, *Circuit Judges*

(Opinion Filed: May 28, 1987)

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OPINION OF THE COURT

GIBBONS, *Chief Judge:*

Albert J. Ferens and Margaret L. Ferens appeal from a summary judgment which was entered in favor of defendant, Deere & Company (Deere), in their product liability action grounded in diversity. The district court held that the action was time barred by Pennsylvania's two-year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524 (2) (Purdon 1981). Because their action was transferred pursuant to 28 U.S.C. § 1404(a)(1982), from the Southern District of Mississippi to the Western District of Pennsylvania, the Ferenses contend that the governing time limitation is Mississippi's six-year statute of limitations for personal injuries. *See* Miss. Code Ann. § 15-1-49 (1972). We affirm.

I.

The Ferenses reside in Dunbar, Fayette County, Pennsylvania. In July, 1981 Mr. Ferens purchased for use on his farm a John Deere Sidehill No. 6620 combine from the Uniontown Farm Equipment Company in Uniontown, Washington County, Pennsylvania. The combine was manufactured and distributed by Deere, a Delaware corporation with its principal place of business in Moline, Illinois and had been sold by Deere to Uniontown for resale. On July 5, 1982, in Washington County, Pennsylvania, while Mr. Ferens was cleaning the combine, his right hand became enmeshed in its rotating augur and was severed above the wrist.

On July 3, 1985 the Ferenses filed Civil Action No. 85-1534 in the Western District of Pennsylvania, alleging that Deere breached certain express and implied warranties of merchantability and fitness for use, in violation of the Pennsylvania Commercial Code. *See* 13 Pa. Cons. Stat. Ann. §§ 1101-9507 (Purdon 1984). This breach of warranty action, which is still pending, seeks compensation for Mr. Ferens' personal injuries. Under Pennsylvania law, a four-year statute of limitations governs actions for breach of warranty. *See* 13 Pa. Cons. Stat. Ann. § 2725 (Purdon 1984); 42 Pa. Cons. Stat. Ann. § 5525 (Purdon 1981).

On July 25, 1985 the Ferenses also filed Civil Action No. 85-2725 in the Southern District of Mississippi, Jackson Division, seeking identical damages as those sought in Pennsylvania for the same personal injuries suffered in the July 5, 1982 accident. In the Mississippi action, recovery was based on theories of negligence and strict liability in tort. Specifically, the Ferenses claimed that the combine was defective and that Deere failed to warn of the defects. The Ferenses chose Mississippi because Deere

was qualified to do business there, having had appointed a local registered agent, as it had in many other states, and because the Mississippi statute of limitations for personal injuries is six years.[1] *See* Miss. Code Ann. § 15-1-49 (1972). The Ferenses did not allege that Deere designed or manufactured the combine in Mississippi, or that they ever set foot in that state.

After Deere filed an answer in the Mississippi action, the Ferenses made a motion, pursuant to 28 U.S.C. § 1404(a), to transfer their case to the Western District of Pennsylvania, claiming, *inter alia*, a) that they resided in Pennsylvania; b) that the accident occurred in Pennsylvania; c) that their claim had no connection with Mississippi; d) that a substantial number of material witnesses resided in the Western District of Pennsylvania, while none were in Mississippi; e) that a substantial number of necessary documentary exhibits were in the Western District of Pennsylvania, while none were in Mississippi; and f) that the breach of warranty action pending in the Western District of Pennsylvania, involving the same accident, presented common questions of fact and law. On November 8, 1985, the transfer motion was granted and on November 21, 1985 the breach of warranty action and the negligence and strict liability action were consolidated for all purposes.

On February 20, 1986, Deere made a motion for summary judgment on all claims, asserting that the Pennsylvania statute of limitations barred the negligence and strict liability claims, and that the terms of its written warranty precluded the breach of

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[1]Pennsylvania has a two-year statute of limitations for personal injuries, 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981) which had run when this action was filed three years after the accident occurred.

warranty claims. The district court held that, despite the fact that the negligence and strict liability action had been transferred from Mississippi, it was governed by the Pennsylvania statute of limitations. Additionally, the court held that material fact issues prevented summary judgment in the breach of warranty action. Thus, summary judgment was entered on the negligence and strict liability claims, and the court directed the entry of final judgment pursuant to Fed. R. Civ. P. 54(b). This appeal followed. The breach of warranty case has been stayed pending its resolution.

II.

The Ferenses' position is straightforward. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), federal district courts sitting in diversity must apply the choice-of-law rule of the state in which they sit. Moreover, under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), when a diversity action is transferred from one federal district court to another, the transfer does not result in the application of a new choice-of-law rule. Thus, the Ferenses urge, the District Court for the Western District of Pennsylvania was obliged to apply Mississippi's choice-of-law rule with respect to the statute of limitations governing personal injury cases. The Ferenses insist that Mississippi in this case would apply its own statute of limitations, and that therefore the Western District of Pennsylvania must do likewise.

The issue presented in the instant appeal, however, is not as facile as the Ferenses would have us believe. Their arguments ignore the constitutional limits imposed upon the application of transferor state law. Thus, we begin with an examination of Mississippi law, which is aberrational in two respects.

First, Mississippi has adopted a highly unusual six-year statute of limitations for personal injury actions,[2] whereas most states have two-or three-year statutes of limitations for such claims. Second, the Mississippi Supreme Court has made an exceptionally uncommon interpretation of its borrowing statute. Like most jurisdictions in the United States, Mississippi has adopted a borrowing statute with respect to time limitations on actions.[3] The Mississippi version provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Miss. Code Ann. § 15-1-65 (1972).

On its face, Mississippi's borrowing statute would seem to suggest that Mississippi would look to Pennsylvania for the limitations period governing the Ferenses negligence and strict liability claims since

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[2]Only five states have six-year statutes of limitations for personal injury claims. *See* Me. Rev. Stat. Ann. tit. 14, § 752 (1964); Minn. Stat. § 541.05 (Supp. 1987); Miss. Code Ann. § 15-1-49 (1972); N.D. Cent. Code § 28-01-16 (1974); S.C. Code Ann. § 15-3-530 (Law Co-op 1977).

[3]Pennsylvania borrowing statute, for example, provides:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim.

42 Pa. Cons. Stat. Ann. § 5521 (Purdon 1981).

those claims would be time barred in Pennsylvania. Relying on the clause "where the defendant has resided before he resided in this state," however, the Mississippi Supreme Court has held that its borrowing statute "only applies where a non-resident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 667, 131 So. 84, 88 (1930); *see also Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983) (applying the Mississippi Supreme Court's interpretation of § 15-1-65). Because Deere was qualified to do business in Mississippi at the time this action accrued, it would be treated as a resident of Mississippi under Mississippi law. *See Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir. 1969). Thus, the Ferenses argue that because the Mississippi borrowing statute is inapplicable, Mississippi would apply its own statute of limitations, and under *Klaxon* and *Barrack* the federal courts must do likewise.

Oddly, the one federal appellate court which has confronted the anomaly of applying a Mississippi statute of limitations to an action having no nexus with that state, *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), has applied *Klaxon* and *Barrack* in the manner which the Ferenses urge. In *Schreiber*, a Kansas plaintiff was injured in Kansas by a product manufactured by a Delaware corporation with its principal place of business in Wisconsin. After the expiration of the Kansas statute of limitations but before the expiration of the Mississippi statute, the Kansas plaintiff sued in the federal district court in Mississippi, which thereafter transferred the action, pursuant to 28 U.S.C. § 1404(a), to a federal district court in Kansas. The federal district court in Kansas refused to apply the Mississippi statute of limitations.

See 448 F. Supp. 1079 (D. Kan. 1978). The Court of Appeals for the Tenth Circuit, however, reversed, holding that *Van Dusen v. Barrack* controlled and that the Mississippi statute of limitations applied.

Although *Schreiber v. Allis-Chalmers Corp.* is precisely on point,[4] , it has been severely criticized. *See* E. Scoles & P. Hay, *Conflict of Laws* 132 (1984); Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L.J. 1, 56-65. We agree with the critics that at most, *Klaxon* and *Barrack* require a federal diversity forum to apply a state choice-of-law rule which the state court could, as a matter of federal law, lawfully apply. Indeed, the *Van Dusen v. Barrack* Court expressly acknowledged as much. The Court, in rejecting the contention that a section 1404(a) transfer would result in a prejudicial change of law, observed:

> In so ruling, however, we do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee State.[41]
>
> 41. We do not suggest that the application of transferor state law is free from constitutional limitations. *See, e.g., Watson v. Employers Liability Assurance Corp., Ltd.*, 348 U.S. 66;

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[4]While Deere points out that in *Barrack* and in *Schreiber* the transfer motions were made by defendants, *see Barrack*, 376 U.S. at 614; *Schreiber*, 611 F.2d at 791, and that in the instant appeal the section 1404(a) motion was made by the plaintiff, *see* 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure, § 3846 (2d ed. 1986), our decision today does not depend on this distinction.

> *Hughes v. Fetter*, 341 U.S. 609; *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493; *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532; *Home Ins. Co. v. Dick*, 281 U.S. 397.

Van Dusen v. Barrack, 376 U.S. at 639. Thus, the *Barrack* Court reasserted the continuing authority of those cases which, under the due process and full faith and credit clauses, have established federal limits upon aberrational state choice-of-law rules.

Moreover, the *Barrack* Court's reference to *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), is for present purposes particularly significant. *Dick* involved a Texas state court applying Texas law to avoid the application of a contract term that barred any action on the insurance policy commenced after one year. The policy had been issued in Mexico to a Mexican citizen, covering a Mexican risk, and a Mexican loss had in fact occurred. The contract term in question was valid under Mexican law. The *Dick* court held that by applying its own longer limitation of actions policy instead of that of the jurisdiction having more significant contacts with the occurrence (Mexico), Texas violated the due process clause. *See Dick*, 281 U.S. at 408; *see also Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (Mississippi courts cannot void limitation of action provision in Tennessee insurance policy).

Although both *Dick* and *Delta & Pine Land Co.* involved contracts incorporating shorter limitations than those authorized by the governing state law, those holdings are not limited to contractual situations. As Justice Brennan explained in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 310-11 (1981):

> *Dick* and [*John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936)] stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. *Dick* concluded that nominal residence -- standing alone -- is inadequate; *Yates* held that postoccurrence change of residence to the forum State -- standing alone -- was insufficient to justify application of forum law.

All the cases decided by the Supreme Court after *Dick* which permitted the application of forum law over due process of full faith and credit objections involved situations in which the forum state had some contact with the case and some interest by virtue of that contact, justifying the application of the forum state's law. *See Hague*, 449 U.S. at 312-13; Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980).

The instant appeal presents the precise situation to which Justice Brennan refers in *Hague* -- nominal residence, standing alone. Deere is nominally a resident of Mississippi because, in order to do business there, it has appointed a local resident agent. The lawsuit does not grow out of any business which Deere conducted in Mississippi. Mississippi has no interest in the injuries sustained by Mr. Ferens, or in the transaction by which he acquired the combine that injured him. Mississippi's contacts with the parties and the occurrence or transaction are plainly so insignificant that the application of its law would be arbitrary, fundamentally unfair, and therefore unconstitutional. *See Hague*, 449 U.S. at 312-13.

III.

Consequently, because Mississippi could not apply its own law to the Ferenses' suit against Deere if the suit were pending in a Mississippi state court, neither *Klaxon* nor *Barrack* require that a federal diversity forum do so either. Conversely, since the Ferenses are Pennsylvania residents, the injury occurred in Pennsylvania, and the combine was acquired there, Pennsylvania has substantial contacts with the occurrence, thereby rendering the application of its law neither arbitrary nor fundamentally unfair.[5] Hence, the district court did not err in rejecting the applicability of the Mississippi statute of limitations.

The judgment appealed from will therefore be affirmed.

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[5]Because we hold that Mississippi could not constitutionally apply its law in this case, we have no reason to consider whether, as Deere contends, the *Van Dusen v. Barrack* rule applies only when a defendant makes a section 1404(a) motion. *See* note 4 *supra*.

Seitz, *Circuit Judge*, dissenting.

It is hardly original to say that hard cases make bad law. Depending on one's perspective, this case involves either skillful lawyering within established rules to obtain favorable law or unfair forum-shopping. The majority, in my view, has unwarrantedly imposed constitutional limitations on a forum's choice of law to prevent the Ferenses from gaining an advantage under the provisions of 28 U.S.C. § 1404(a).

The majority holds that it would be unconstitutional for a Mississippi state court to apply its statute of limitations in this case. In so holding, it ignores the distinction between the constitutional limitations on a forum's choice of substantive law and a forum's application of its procedural law.

The forum has traditionally applied its state's statute of limitations, regardless of what state's substantive law controlled. *See Keeton v. Hustler Magazine, Inc.*, *465 U.S. 770, 778 n.10 (1984)*; *Scudder v. Union National Bank*, 91 U.S. (1 Otto) 406 (1875); *Ross v. Johns-Manville Corp.*, 766 F.2d 823 (3d Cir. 1985); *Loughan v. Firestone Tire & Rubber Co.*, 624 F.2d 726 (5th Cir. 1980); Restatement (Second) of Conflict of Laws § 142(2)(1971). Although most states have enacted borrowing statutes to address the problem presented in this case, I am not persuaded that this choice-of-law approach is mandated by the Constitution.

The majority opinion fails to cite any cases supporting its position that a forum's application of its statute of limitations may violate the due process clause of the Constitution. The two Supreme Court cases relied on by the majority, *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), and *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), address only the constitutional limits on a forum's choice of substantive

law. In *Hague*, Justice Brennan stated that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13. Moreover, the Court in *Dick* distinguished the case before it, which involved an attempt to apply Texas substantive law to a contractual limitation on the period in which the parties could sue, from a case in which the forum simply applied its procedural statute of limitations. 281 U.S. at 409-10.

In the absence of any Supreme Court decision disavowing the traditional rule permitting a state to apply its own statute of limitations,[1] I conclude that a Mississippi court's application of its six-year statute of limitations in cases such as the one before us would not violate due process. *See Cowan v. Ford Motor Co.*, 694 F.2d 104, 107 (5th Cir. 1982)(rejecting the contention that *Hague* and *Dick* limit Mississippi's selection of its statute of limitations).

Because I believe a Mississippi court could apply its statute of limitations in this case, I turn now to the issue whether the district court erred in applying Pennsylvania's statute of limitations to the Ferenses' tort claim. The parties agree that the Mississippi state courts would apply its six year statute of limitations in this case. *See Cowan v. Ford Motor Co.*, 719 F.2d 787 (5th Cir. 1983); *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930). They also agree that under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), the federal

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[1]In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984), the Court refused to reach the question whether the traditional choice of law rule, permitting a forum to select its statute of limitations, was limited by the due process clause.

district court in which this case was originally filed was bound to apply Mississippi's choice-of-law rules, and hence, its statute of limitations.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Supreme Court held that the law of the transferor state should be applied when a defendant moves for a transfer under section 1404(a). It based this holding on two grounds. First, it stated that its holding would prevent the defendant from using section 1404(a) as a forum-shopping device. 376 U.S. at 633-636. Second, the Court concluded that under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1934), section 1404(a) should be interpreted to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638. The *Barrack* Court explicitly reserved the question whether the same rule should apply in cases in which the plaintiff initiated the transfer. A number of courts of appeals, however, have held that the law of the transfer state should govern regardless of which party moved for transfer if the transferor court is a proper forum in terms of venue and personal jurisdiction. *See Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir. 1984); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983); *Martin v. Stokes*, 623 F.2d 469, 471-73 (6th Cir. 1980).

By focusing on whether the transferor court was a permissible forum rather than the identity of the party seeking the transfer, the courts have prevented improper forum-shopping by denying plaintiffs the ability to obtain advantageous state law in fora in which they could not properly maintain an action. At the same time, deciding the choice of law issue on the basis of the propriety of the plaintiff's initial forum selection complies with the requirement in *Barrack*

that a transfer from a proper forum does not "achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638.

In this case, there is no dispute that this case could be brought in the federal district court for the southern district of Mississippi in terms of venue and personal jurisdiction over the defendant. Because *Barrack* and the *Erie* doctrine require courts to treat a transfer under such circumstances as "just a change of courtrooms," *Martin v. Stokes, supra*, 623 F.2d at 472, the Mississippi statute of limitations should have been applied to the Ferenses' tort action.

The district court based its decision to apply the transferee's law on the ground that plaintiffs must demonstrate some good faith intent to proceed in the court where the action was originally filed before they can obtain the advantages of the transferor's law. Because it believed that the Ferenses had no intention of proceeding in the Mississippi federal district court, the court applied Pennsylvania's statute of limitations to the tort action.

This factual inquiry into the plaintiff's motives, however, is not justified under section 1404(a). Section 1404(a) permits both plaintiffs and defendants to initiate transfers "for the convenience of the parties." Moreover, as noted above, compliance with the *Barrack* language dictates that the law of the transferor state govern when the transferor court is a permissible forum.

There may be, as the appellees urge, good reasons to prevent clever plaintiffs from taking advantage of the transfer provisions in the way the Ferenses did in this case. Whether there should be restrictions on plaintiff-initiated transfers under section 1404(a), however, is an issue that is best left to Congress.

Federal courts should not "establish and impose upon state courts a federal choice-of-law rule." *Allstate Insurance Co. v. Hague, supra*, 449 U.S. at 334 (Stevens, J., concurring). As a federal court sitting in diversity, the district court of the southern district of Mississippi was bound to apply Mississippi's six-year statute of limitations. To be consistent with both *Erie* and *Barrack*, the transferee court should have applied the Mississippi statute of limitations to the Ferenses' tort action. I would therefore reverse the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Albert J. FERENS and Margaret L. Ferens, his wife, Plaintiffs,

v.

DEERE & COMPANY, Defendant.

Albert J. FERENS and Margaret L. Ferens, his wife, Plaintiffs,

v.

JOHN DEERE COMPANY, a/k/a Deere & Company, Defendant.

Civ. A. Nos. 85-1534, 85-2725.

United States District Court, W.D. Pennsylvania.

July 25, 1986.

Stanley V. Ostrow, William A. Penrod, Pittsburgh, Pa., Faye Murphree James, William R. Barnett, Jackson, Miss., for plaintiffs.

Gary J. Sharlock, Sharlock, Repcheck & Mahler, Pittsburgh, Pa., for defendant.

OPINION

COHILL, Chief Judge.

Presently before the Court is defendant's Motion for Summary Judgment in the above-captioned cases. Diversity jurisdiction is proper pursuant to 28 U.S.C. §1332 (1982).

Summary of Facts and Procedural History

Plaintiffs, Albert J. Ferens and Margaret L. Ferens, reside in Dunbar, Fayette County, Pennsylvania. Defendant, Deere & Co., is a Delaware corporation with its principal place of business in Moline, Illinois. Defendant Company is in the

business of manufacturing, advertising, selling and distributing combines, which are used to thresh and clean grain.

On or about July 17, 1981, Plaintiff purchased a John Deere Sidehill #6620 Combine, Serial No. 454907, which was manufactured by Defendant. Complaint, ¶4. Defendant sold the combine in question to the Uniontown Farm Equipment Company, which company thereafter sold the combine to Plaintiff for use on his farm. *Id.*, ¶6.

On or about July 5, 1982, in Washington County, Pennsylvania, while Plaintiff was cleaning the combine, his right hand was pulled into the rotating auger, thereby amputating it above the wrist. *Id.*, ¶7.

On July 3, 1985, Plaintiffs filed C.A. 85-1534 in the Western District of Pennsylvania, basing their claim on the Pennsylvania Commercial Code, 13 Pa.C.S. §§1101-9507 (Purdon 1984). Specifically, Plaintiffs alleged that the combine was expressly and/or impliedly warranted by Defendant to be merchantable and fit for the ordinary purposes for which it was used, and that Defendant breached its express and/or implied warranties since the combine was, in fact, defective.

Subsequently, on July 25, 1985, Plaintiffs filed C.A. 85-2725 in the Southern District of Mississippi, Jackson Division. That action, which was founded on the same accident whereby Plaintiff lost his right hand, sought damages which were identical to those sought in Plaintiffs' initial action; however, recovery was based on theories of negligence and strict liability under §402A and B of the Restatement (2d) of Torts. In their complaint in the subsequent action, Plaintiffs alleged that the combine was defective in and of itself, and as a result of Defendant's failure to warn of the alleged defects.

In a rather unusual procedural move, Plaintiffs then filed a motion for change of venue of the Mississippi action under 28 U.S.C. §1404(a). Plaintiffs' motion was granted on November 8, 1985 by United States Magistrate John R. Countiss, III of the Southern District of Mississippi, Jackson Division, who transferred Plaintiffs' second action to the Western District of

Pennsylvania. Thereafter, by Order of this Court dated November 21, 1985, the two lawsuits were consolidated for all purposes.

Summary Judgment

Defendant has filed this Motion for Summary Judgment on the grounds that 1) the purchase order disclaimed any implied warranties of merchantability and fitness for a particular purpose, and contained an exclusion of consequential damages; and 2) Pennsylvania's two-year limitations period bars Plaintiffs' negligence and strict liability claims.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.26; *Anderson v. Liberty Lobby Inc.*, ____ U.S. ____, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of proving that no genuine issue exists, *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and any doubts must be resolved in favor of the nonmoving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.1985) (quoting *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir.1981)).

The United States Supreme Court has recently stated that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . ." *Celotex Corp. v. Catrett*, ____ U.S. ____, 106 S.Ct. 2548, ____, 91 L.Ed.2d 265 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 106 S.Ct. at 2510.

Here, the motion is made by the Defendant solely on the basis of the pleadings without supporting affidavits; thus, the motion is functionally equivalent to a motion for judgment on

the pleadings under Fed.R.Civ.P. 12(c). *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270, 273 (2d Cir.1968), quoting 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.02[3], at 2035. As such, all well-pleaded factual allegations of the Plaintiffs must be taken as true and all allegations of the moving party which have been denied are taken as false; conclusions of law are not deemed admitted. *Shade v. Commonwealth of Pennsylvania Dept. of Transportation*, 394 F.Supp. 1237, 1243 (M.D.Pa.1975).

I. *Disclaimer of Warranties*

Defendant claims that the purchase order conspicuously included the warranties which accompanied the sale of the combine and that it disclaimed the implied warranties of merchantability and fitness for particular purpose. In addition, Defendant emphasizes that said purchase order contained a clause excluding consequential damages. Defendant's Answer, Exhibit "A."

Plaintiffs admitted to the authenticity of the purchase order in their Reply to Defendant's Answer; however, Plaintiffs contend that the terms of the purchase order are unconscionable, amount to a contract of adhesion and are against public policy.

Under its adoption of the Uniform Commercial Code, 13 Pa.ClS. §2316 provides that warranties may be excluded or modified at the time of sale:

> §2316. Exclusion or modification of warranties
>
> . . . . .
>
> (b) Implied warranties of merchantability and fitness.—Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify an implied warranty of fitness the exclusion must be by a writing and conspicuous. . . .
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> (c) Implied warranties in general.—Notwithstanding subsection (b):

(1) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which is common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty.

(2) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

(3) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

. . . . . .

Id. See Thermo King Corp. v. Strick Corp., 467 F.Supp. 75 (W.D.Pa.), *aff'd*, 609 F.2d 503 (3rd Cir.1979) (manufacturer's warranty card contained "conspicuous" language to exclude implied warranties).

In the present case, the purchase order provided as follows:

> The Warranty on the reverse side is a part of this contract and the following applies where permitted by law: Neither seller, John Deere Company, nor the manufacturer makes any other representations or warranties, express or implied (AND EXPRESSLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS) or has any obligation to the Purchaser except as priovided on the reverse side.

Defendant's Answer, Exhibit "A."

On the reverse side of this purchase order, in paragraph F, the disclaimer is again set forth:

F. NO REPRESENTATION OR IMPLIED WARRANTY.

Where permitted by law, neither John Deere nor any company affiliated with it makes any warranties, representations or promises, express or implied, as to the quality or performance of its products other than those set forth above and DOES NOT MAKE ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS.

Id.

Paragraph G on the reverse side added:

G. REMEDIES EXCLUSIVE.

The only remedies the purchaser has in connection with the breach or performance of any warranty on John Deere equipment are those set forth above. In no event will the dealer, John Deere or any company affiliated with John Deere be liable for incidental or consequential damages or injuries, including, but not limited to loss of crops, loss of profits, rental or substitute equipment or other commercial loss.

In its definition of consequential damages, 13 Pa. C.S. §2715(b)(2) provides:

(b) Consequential damages.—Consequential damages resulting from the breach of the seller include:

(2) injury to person or property proximately resulting from any breach of warranty.

Id.

Plaintiffs, in support of their argument that the disclaimer of warranties and exclusion of remedies provisions are unconscionable, rely on 13 Pa.C.S. §2719(c):

(c) Limitation of consequential damages.—Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer

goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Id.

Whether a contract or clause is unconscionable is a question of law for the court. *Bishop v. Washington*, 331 Pa.Super. 387, 399, 480 A.2d 1088, 1094 (1984). The relevant section on unconscionability, 13 Pa. C.S. §2302, provides:

> §2302. Unconscionable contract or clause
>
> (a) Finding and authority of court.—If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may:
>
> (1) refuse to enforce the contract;
>
> (2) enforce the remainder of the contract without the unconscionable clause; or
>
> (3) so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (b) Evidence by parties—When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Plaintiffs argue that the above language renders Defendant's motion premature since the parties have not presented evidence on the issue of unconscionability. We agree for the following reasons.

The Pennsylvania Supreme Court has adopted the following definition of unconscionability:

> Unconscionability has generally been recognized to include an *absence of meaningful choice* on the part of one of the parties together with contract *terms which are unreasonably favorable to the other party*.

Witmer v. Exxon Corp., 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981), quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965). In the *Williams* case, Judge Skelly Wright summarized the factors to be considered in determining whether a contract or clause is unconscionable or not:

> Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.
>
> In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case."

Williams, 350 F.2d at 449-450 (footnote omitted).

In the present case, since no affidavits, interrogatories, depositions, or evidence of any sort has been submitted regarding the circumstances surrounding the transaction, we can only speculate as to whether or not the purchase order was unconscionable. Following the mandate of 13 Pa.C.S. §2302(b), we find it necessary to afford the parties a reasonable opportunity to present evidence on the "commercial setting, purpose and effect" of the disputed language in the purchase order. We note that while Plaintiff is a farmer, that alone is not indicative of his commercial standing because he may be a "small-time" farmer or he may be a large corporate farmer with thousands of acres of land. *See Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 224 (4th Cir.1982) (Hall, J., dissenting) ("while in its broadest sense the meaning of 'commercial' could include any activity intended to yield a profit, in common parlance the term is generally associated with manufacturing or retail activities").

Once we are presented with some evidence as to whether the transaction was of a commercial or consumer nature, prior dealings between the parties, customary practice within the industry etc., we will then be able to make a determination on the issue of unconscionability. As it currently exists, however, the record is barren on that matter. Thus, Defendant's reliance on *Beckman v. Vassall-Dillworth Lincoln Mercury, Inc.*, 321 Pa.Super. 428, 468 A.2d 784 (1983) for the proposition that summary judgment should be granted is misplaced, as there, the state court had the benefit of affidavits, deposition testimony and other evidence which enabled it to render a decision that the contract clause was not unconscionable. *Id.* at 439-40, 468 A.2d at 788.

Defendant also relies on *Thermo King Corp., supra*, where this Court found a similar warranty exclusion and limitation of remedy provision not to be unconscionable. However, *Thermo King* is not dispositive of this case because it indubitably involved a commercial transaction between two corporate parties. *Id.*, at 78. Moreover, unlike the situation in the case before us which involves injury to the person, *Thermo King* only involved consequential damages for the loss of $15,000 worth of cargo. *Id.* at 77. While the applicable provisions of the purchase

order here would most likely bar a claim for the loss of crops or profits resulting from a defective blade in the combine, we are not convinced that Plaintiff understood those provisions as limiting his right to bring a breach of warranty action for the loss of his hand. *Cf. Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146 (3d Cir.1974) (contract clause must clearly and unequivocally express intent necessary to exculpate defendant from negligence or strict liability claims).

Accordingly, we will deny Defendant's Motion for Summary Judgment on Plaintiff's breach of warranty claim without prejudice. Defendant may reassert said motion, if deemed necessary, once the record becomes fully developed as set forth above. *See Wobb v. Ford Motor Co.*, 76 F.R.D. 452, 458 (W.D.Pa.1977) (motion for summary judgment denied with respect to counts alleging unconscionability of dealer development arrangement since further discovery was necessary relative to motive and intent).

II. *Applicable Statute of Limitation for Plaintiffs' Tort Claims*

Our inquiry now turns to what statute of limitations governs Plaintiffs' negligence and strict liability claims. At the outset, we note that Pennsylvania has a two-year statute of limitations for injuries to the person, 42 Pa.C.S. §5524(2) (Purdon 1981), whereas Mississippi's limitation period is six years. Miss.Code Ann. §15-1-49 (1972).

As we noted earlier, Plaintiffs' tort actions were originally filed in the Southern District of Mississippi *after* Plaintiffs initiated their UCC breach of warranty claims in the Western District of Pennsylvania. Plaintiffs then transferred their tort actions from the Southern District of Mississippi to this Court pursuant to 28 U.S.C. §1404(a) which provides:

> For the convenience of the parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought.

Id.

In support of the transfer, Plaintiffs stressed the feasibility of consolidating their tort claims with their pending UCC claims in this District Court and raised concerns about the inconvenience and expense that would result if their second action remained in the Southern District of Mississippi. In his Affidavit In Support of Motion for Change of Venue, Albert J. Ferens admitted that:

> 6. The action against defendant, Deere & Company, in the Western District of Pennsylvania arises out of said accident which occurred on July 5, 1982, and is based on provisions of the Uniform Commercial Code.
>
> 7. The basis of the action filed against Defendant in the Southern District of Mississippi was the aforesaid July 5, 1982 accident and is based on strict liability, negligence and breach of warranty by said defendant.
>
> 8. That all witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania.
>
> 9. That all documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania.
>
> 10. That to simultaneously pursue the Pennsylvania and Mississippi actions as separate lawsuits would be a great cost and expense to him.

Id., ¶¶6-10.

In the instant case, both parties concede that statutes of limitations are procedural and that the applicable limitation period is to be provided by the law of the forum. *See Butler v. Dravo Corp.*, 310 F.Supp. 1265 (W.D.Pa.1970); *Vick v. Cochran*, 316 So.2d 242 (Miss.1975). To prevent forum shopping and to keep lawsuits in forums which have a significant nexus and a legitimate interest in the litigation, most jurisdictions, including Pennsylvania and Mississippi, have adopted "borrowing statutes." In essence, borrowing statutes adopt as the

applicable period of limitation the statute which would have applied in the jurisdiction where the claim arose. For instance, Pennsylvania's borrowing statute provides that:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, which ever first bars the claim.

42 Pa.C.S. §5521.

However, the crux of the problem in the instant case stems from Mississippi's anomalous borrowing statute which provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country *where the defendant has resided before he resided in this state*, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Miss.Code Ann. §15-1-65 (1972) (emphasis added). The Mississippi Supreme Court, relying on the highlighted language above, has held that this borrowing statute "only applies where a nonresident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84, 88 (1930). *See also Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir.1983) (applied Mississippi Supreme Court's interpretation of that state's borrowing statute). Since Defendant was registered to do business in Mississippi at the time of the accident here, Defendant would be treated as a resident under Mississippi law. *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir.1969). Relying on Mississippi's borrowing statute, Plaintiffs contend that the 6-year limitation of that forum should be applied.

We now reach the threshold question of whether the law of the transferor forum or the transferee forum should be applied. In resolving this question, we must consider whether Plaintiffs can utilize the change of venue provisions of 28 U.S.C. §1404(a) to resurrect a time-barred claim in the more convenient forum.

In *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), the Supreme Court held that "where defendants seek transfer, the transferee district court must be obligated to apply the state law that would have applied if there had been no change of venue." *Id.* at 639, 84 S.Ct. at 821, 11 L.Ed. at 962. The *Van Dusen* Court pointed out that "both the history and purpose of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of court rooms." *Id.* at 636, 84 at 819, 11 L.Ed.2d at 916. The Court stressed that §1404(a) should not be used as a device by defendants to undermine the plaintiff's privilege of selecting "a forum which, although it was inconvenient, was a proper venue." *Id.* at 634, 84 S.Ct. t 818, 11 L.Ed.2d at 960. Moreover, the Court noted that if a change of law were concomitant with transfer, §1404(a) would become a forum shopping mechanism. *Id.* at 636, 84 S.Ct. at 819, 11 L.Ed.2d at 961. While *Van Dusen* concluded that a change of venue should normally be considered no more than a change of court rooms, the Court qualified its holding by continuing:

> In so ruling, however, we do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee, state. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a)
>
> . . . . .

Id. at 639-640, 84 S.Ct. at 821, 11 L.Ed. at 963.

As of this moment, the Supreme court has not ruled on the issue left unanswered by *Van Dusen*, and our research has not found any controlling authority in the Court of Appeals for the Third Circuit. However, it has been suggested that a logical interpretation of the question left unanswered by *Van Dusen* is that when a plaintiff moves to transfer, the law of the transferee

state should apply, otherwise plaintiffs, as opposed to defendants, would be free to shop for inconvenient forums with longer limitation periods. *See* C. WRIGHT, LAW OF FEDERAL COURTS, §44 at 261-62 n. 35 (West 4th Ed.1983); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). *But see*, Note, *Choice of Law In Federal Court After Transfer of Venue*, 63 CORNELL L.REV. 149, 157-58 (1977). The reasoning behind the ALI view is that it will prevent plaintiffs from using transfers to carry favorable law from one forum to another. This rationale has been followed by courts in analogous situations. *Cf. Carson v. U-Haul Co.*, 434 F.2d 916 (6th Cir.1970) (plaintiff moved to transfer to forum with longer statute of limitations; defendant not amendable to process in original forum); *Parham v. Edwards*, 346 F.Supp. 968 (S.D. Ga.1972) (justice did not require transfer from original forum, with favorable limitation period to plaintiffs but no personal jurisdiction over defendants, to forum in which service had been obtained in a similar action, but where the action was barred by the limitation period); *Mata v. Budd Co.*, 44 F.R.D. 225 (E.D.Pa.1968) (plaintiff filed lawsuit in forum where statute of limitations barred action and sought to transfer to forum with favorable limitation period); Annot., 7 A.L.R.Fed. at 27-28 (1971).

Plaintiffs argue that the law of the transferee state applies only when personal jurisdiction with the defendant is lacking or venue is improper, neither of which was contested here. *See, e.g., Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir.1984) (law of forum selected by plaintiff should govern regardless of which party initiates transfer to another district); *Martin v. Stokes*, 623 F.2d 469, 471 (6th Cir.1980) (same). *See also Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir.1980) (similar facts; law of transferor state applied where defendant initiated transfer). However, in *Gonzales*, the court held that plaintiffs are "not permitted to capture favorable law of forums which lack personal jurisdiction over the defendant by filing suit there and then transferring the action to a state that is able to assert personal jurisdiction." *Id.* at 1224. By analogy, we believe that this reasoning should apply to the facts

before us since plaintiffs could not have originally brought their second action in the forum where it has been transferred due to the applicable limitations period. We reiterate that §1404(a) only permits the transfer of an action to a "district or division where it might have been brought." 28 U.S.C. §1404(a) (emphasis added.)

We believe that, at the very least, some measure of good faith expectation of proceeding in the court in which the complaint is filed is essential to allow Plaintiffs to avail themselves of that forum's limitation period, and the filing of a complaint which is merely a procedural ploy will not suffice. *Cf. Biby v. Kansas City Life Insurance Co.*, 629 F.2d 1289, 1294 (8th Cir.1980) (filing of complaint in transferor state was merely a procedural ploy and did not commence action for purposes of tolling the limitation period).

The fact that Plaintiffs' original lawsuit in this District Court did not include the claims which were time-barred under Pennsylvania law unequivocally establishes that Plaintiffs were seeking to maneuver around this by intentionally filing a second action in an inconvenient forum to avail themselves of that forum's longer statute of limitations and its plaintiff-oriented borrowing statute. By filing a subsequent lawsuit in the Southern District of Mississippi to take advantage of that state's six-year limitation period and then moving to transfer that action with their pending action in this District Court for purposes of convenience, consolidation and efficiency, Plaintiffs are seeking the "best of both forums." While we acknowledge the strong presumption in favor of a plaintiff's choice of forum, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055, 1062 (1947), where a plaintiff chooses a forum which is not his home forum, his choice should be given considerably less weight. *Jordan v. Delaware & Hudson Ry. Co.*, 590 F.Supp. 997, 998 (E.D.Pa.1984). This consideration becomes especially relevant here since the matters relied on by Plaintiffs in support of their transfer were known to them well before they instituted their second lawsuit.

We believe that Plaintiff's tactics in this case amount to a judicial juggling act between forums—one with a clear interest

in the litigation and one whose interest is nominal at best. The only nexus between Plaintiffs' claims and Mississippi is that the Defendant Company is registered to conduct business there, has a designated agent for service of process in that state and actually transacts some business in Mississippi. On the other hand, Plaintiffs are residents of Pennsylvania, and the claim arose in Pennsylvania directly as a result of Defendant's having conducted business within that state. Regarding the choice of law issue, even under the "center of gravity" test adopted in *Mitchell v. Craft*, 211 So.2d 509 (Miss.1968), we find that Pennsylvania substantive law would govern this dispute.

Implicit in the holding of *Van Dusen* is the rationale that §1404(a) is simply a judicial housekeeping device to assure convenience and fairness to the parties. Further, we are mindful that a transfer under §1404(a) must be "in the interest of justice." Therefore, under the facts of this case, we refuse to allow Plaintiffs to transform §1404(a) into a device which would enable them to forum shop for a favorable limitation period. *Kaiser v. Mayo Clinic*, 260 F.Supp. 900, 907 (D.Minn.1966). Since Plaintiffs were fully aware of all the relevant facts at the time they commenced both actions, including the fact that the Southern District of Mississippi was an inconvenient forum, the " 'interest of justice' would be thwarted rather than served if this Court permitted this type of 'legal footwork'." *Mata*, 44 F.R.D. at 226-27 (citations omitted).

Accordingly, Defendant's motion for summary judgment is granted as to Plaintiffs' tort claims which are barred by the limitation period of 42 Pa.C.S. §5524(2).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and MARGARET L. FERENS, his wife

v.

DEERE & COMPANY,

(D.C. Civil No. 85-1534)

ALBERT J. FERENS and MARGARET L. FERENS, his wife

v.

JOHN DEERE COMPANY, a/k/a/ DEERE & COMPANY

(D.C. Civil No. 85-2725)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG and ALDISERT, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Chief Judge

Dated: July 9, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 29, 1987

No. 86-3595

ALBERT J. FERENS, ETC., *Appellants*

vs.

DEERE & COMPANY

Present: GIBBONS *Chief Judge*, SEITZ and ALDISERT, *Circuit Judges*

1. Motion by appellant to recall and stay the mandate.

in the above-entitled case. Any answer which would be due by August 1, 1987, will be forwarded to you upon receipt of same.

Deputy Clerk Direct Dial 597-3135

ORDER

The foregoing motion by appellant to recall and stay the mandate is denied. Judge Aldisert would grant the stay for thirty days but no longer.

By the Court,

Chief Judge

Dated: August 6, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

HOLLY BUCKLEY and ROBERT BUCKLEY, JOHN ROTH and LINDA ROTH, LINDA K. SMITH, in her own right and as Executrix of the ESTATE OF OLLIE BURROWS, deceased, ROSALIND BLOOM and NATHAN BLOOM, DOROTHY A. REAMER, in her own right and as Executrix of the ESTATE OF WALTER H. REAMER, deceased, CHARLES D. O'BRIEN and HELEN D. O'BRIEN, in their own right and as parents and natural guardians of JENNIFER C. O'BRIEN, a minor, HAROLD M. SHULTZ and ELAINE L. SHULTZ, ROSA LEE WALKER and WILLIAM M. WALKER,

Plaintiffs

v.

NO. S86-0361(B)

BABCOCK & WILCOX COMPANY, INC.; J. RAY MCDERMOTT AND COMPANY, INC.,

Defendants

ORDER

THIS DAY the above styled and numbered cause came on, on the Defendants' Motion to Transfer pursuant to *28 U.S.C.(a)*, and Plaintiffs Response thereto, and it appearing to the Court that the fact witnesses are concentrated in or near the Middle District of Pennsylvania; the likely expert witnesses are concentrated in or near the Middle District of Pennsylvania; Plaintiffs reside in the Middle District of Pennsylvania; the incident occurred in that District; and that Court has had six years of experience handling like cases arising out of the same incident; it is, therefore,

ORDERED AND ADJUDGED that Defendants' Motion be and hereby is granted, and this action and those listed on

Exhibit "A" hereto are transferred to the United States District Court for the Middle District of Pennsylvania, together with every action now pending or heretofore commenced in this District which arises out of the Three Mile Island accident of March 28, 1979, and in which the Plaintiffs reside in states other than Mississippi and the Defendants are neither incorporated in nor have their principal place of business in Mississippi.

THIS COURT, without intending to force any result upon the transferee forum, wishes to bring to the attention of that forum the ruling of the United States District Court for the Northern District of Mississippi in the case of "Milton Gluskin v. Standard Insulations, Inc., et al," No. WC83-200-LS-P, Northern District of Mississippi, Western Division, transferring said cause to the Southern District of New York, and would respectfully indicate that this Court would be inclined to follow Chief Judge Senter's ruling, a copy of which is attached hereto as Exhibit "B", with regard to the applicability of the Mississippi statute of limitations.

THIS COURT, further Orders that the Defendants may have twenty (20) days from the date this Order is filed with the Court in the Middle District of Pennsylvania in which to file their Answer or otherwise plea.

SO ORDERED AND ADJUDGED, this the 7th day of July, A.D., 1986.

_____
UNITED STATES MAGISTRATE

APPROVED:

_____
Wm. Robert Wilson, Jr.
Attorney for Plaintiffs

_____
MICHAEL J. McELHANEY, JR.
Attorney for Defendants

EXHIBIT "A"

HOLLY BUCKLEY, et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

MILTON GLUSKIN,

Plaintiff

v. NO. WC83-200-LS-P

STANDARD INSULATIONS, INC., et al.,

Defendants.

MEMORANDUM OPINION

By order dated December 2, 1983, the court informed the parties that pursuant to 28 U.S.C. §1404(a), it was considering a transfer of this action to the United States District Court for the Southern District of New York. The parties have now been given more than thirty days in which to show cause why this action should not be so transferred. The court, having considered the memoranda submitted by the parties,[1] together with the pleadings and discovery materials, and being otherwise fully advised in the premises, is now in a position to determine the propriety of such a transfer.

28 U.S.C. §1404(a) provides that:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Under section 1404(a), a district court in which venue is proper may nevertheless transfer a civil action to any district in which it might originally have been brought if such a transfer is for the convenience of the parties and in the interest of justice. This section reflects a desire to have federal civil actions tried in the district necessitated by considerations of convenience and

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1. Several parties have not filed memoranda with the court but have indicated that they neither object to nor agree with the proposed transfer.

justice. *Van Dusen v. Barrack*, 376 U.S. 612, 616-622, 84 S.Ct. 805, 11 L.Ed.2d 945, 949-953 (1964).

A court's authority to transfer cases under section 1404(a) does not depend upon the motion or consent of the parties to an action. *Clopay Corp. v. Newell Companies, Inc.*, 527 F.Supp. 733, 737 (D. Del. 1981). Section 1404(a) empowers a district court to transfer venue on its own motion. *See Lead Indus., Inc. v. OSHA*, 610 F.2d 70, 79 n.17 (2d Cir. 1979); *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 556-57 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754 (3rd Cir. 1973); *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361, 363 (8th Cir. 1965); *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267 (3rd Cir. 1962); *Clopay Corp. v. Newell, supra; Nation v. United States*, 512 F.Supp. 121, 127 (S.D. Ohio 1981); *Riordan v. W. J. Brerer, Inc.*, 466 F.Supp. 411, 418 (S.D. Ga. 1979). When a court *sua sponte* considers the transfer of an action, the parties must be given notice and an opportunity to be heard. *Swindell-Dressler*, 308 F.2d at 273-74; *Clopay Corp.*, 527 F.Supp. at 738. In the action *sub judice*, the parties were given notice of the possible transfer of this action on or about December 2, 1983. Parties were given fifteen days in which to show cause why this action should not be so transferred. Several extensions have been given to the parties, and they have, therefore, been accorded ample opportunity to develop and explain their positions in regard to the proposed transfer. Having thus met the requirements imposed by §1404(a) and the general principles of fairness, this court possesses full authority to transfer this action if such a transfer is warranted. *See Hite v. Norwegian Caribbean Lines*, 551 F.Supp. 390, 393 (E.D. Mich. 1982), (*citing Starnes v. McGuire*, 512 F.2d 918, 933-34 (D.C. Cir. 1974)); *Donald v. Seamans*, 427 F.Supp. 32, 32-33 (E.D. Tenn. 1976); *Stanley Works v. Globemaster Inc.*, 400 F.Supp. 1325, 1338 (D. Mass. 1975); *Monsanto Co. v. United Gas Pipe Line Co.*, 360 F.Supp. 1054, 1056 (D. DC 1973).

28 U.S.C. §1404(a) presupposes at least two forums in which the defendant is amenable to process and in which venue

is proper.[2] Thus, prior to transfer, the transferor court must establish that venue is proper in both the transferor and transferee districts with respect to every defendant and that all defendants were amenable to process emanating from both districts at the time the action was initially commended. *See Van Dusen v. Barrack*, 376 U.S. at 621-22, 11 L.Ed.2d at 952-53; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 57 S.Ct. 839, 91 L.Ed. 1055 (1947); *Lamont v. Haig*, 590 F.2d 1124, 1131 n.45 (D.C. 1978).

Venue of a diversity action, such as the action *sub judice*, is governed by 28 U.S.C. §1391(a). Pursuant to section 1391(a), venue is proper in any district in which all plaintiffs or all defendants reside or where the cause of action accrued.[3] In the action *sub judice*, venue is proper in this district, for all defendants are licensed to do business or are doing business within the State of Mississippi. Venue is also proper as to the transferee district because the plaintiff resides and/or the cause of action accrued in the transferee district.

Additionally a review of the record in this action establishes that this court possesses *in personam* jurisdiction over the defendants to this action. The diversity of citizenship of these parties will not be affected by the transfer of this action. Furthermore, all defendants to this action are subject to the *in personam* jurisdiction of, and are amendable to process in, the transferree district. Thus, the prerequisites for a valid transfer pursuant to 28 U.S.C. §1404(a) are present in the action *sub judice*.

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2. A district may be considered a district in which the action "might have been brought" even though the suit would have been barred by the statute of limitations of the transferee state, so long as the jurisdictional and venue requirements are met. *Cowan v. Ford Motor Co.*, 713 F.2d 100, 103 n.4, *reh'g* 719 F.2d 785 (5th Cir. 1983) (*citing Van Dusen v. Barrack*, 376 U.S. 612, 621-22, 84 S.Ct. 805, 11 L.Ed.2d 945, 952, 953 (1964).

3. 28 U.S.C. §1391(c) then provides that: "A corporation may be sued in any judicial district in which it is incorporated, or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

The factors[4] to be weighted in determining the propriety of a section 1404(a) transfer were articulated by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 601, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).[5] The key consideration, as set out in section 1404(a), is the convenience of the parties and witnesses. *Wilmot H. Simonson Co. v. Green Textile Assoc.*, 554 F.Supp. 1229, 1234 (N.D. Ill. 1983); *Cambridge Filter Corp. v. International Filter Co.*, 548 F.Supp. 1308, 1311 (D. Nev. 1982). In addition, the following factors are to be considered: (1) the relative ease of access to sources of proof; (2) the availability of process to compel the attendance of witnesses; (3) the cost of obtaining the presence of willing witnesses; (4) the cost of transporting counsel and the litigants to the place of trial and living expenses at trial; (5) the public interest in the expeditious and inexpensive administration of justice, and (6) the source of applicable substantive law. *See Van Dusen v. Barrack*, 376 U.S. at 645 (1964); *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508-509; *Cambridge Filter Corp.*, 548 F.Supp. at 1311; *Holvitz v. Norfleet-Ashley, Inc.*, 369 F.Supp. 394, 398 (N.D. Miss. 1973); *Schneider v. Sears*, 265 F.Supp. 257, 263 (S.D. N.Y. 1967). Thus, a transfer to another forum "must be shown to be not only convenient, but also in the interest of justice." *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3rd Cir. 1980), 450 U.S. 909, *rev'd on other grounds, sub. nom. Hartzell Propeller, Inc. v. Reyno*, 4 U.S. 235 (1981), *reh'g denied* 455 U.S. 928 (1982).

Although a district judge has the authority to transfer an action to any district in which it "might have been brought," the

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4. When a §1404(a) transfer is initiated by the court on its own motion, the factors to be considered are identical to those considered in a case where a party moves for transfer. *Clopay Corp. v. Newell Cos.*, 527 F.Supp. 733, 737-38 (D. Del. 1981).

5. *Gilbert* involved the common law doctrine of *forum non conveniens*. The factors involved in a section 1404(a) transfer are the same as those considered on a motion to dismiss on the grounds of *forum non conveniens*. Section 1404(a) was, however, designed to give the court broader discretion than that accorded under *forum non conveniens* and to permit a transfer upon a lesser showing of inconvenience. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32, 75 S.Ct. 544, 99 L.Ed. 789, 793 (1954).

plaintiff's choice of forum is entitled to consideration. *Time Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966). It is well established that "[t]he plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations." *Howell v. Tanner*, 650 F.2d 610, 615 (5th Cir. 1981), *cert. denied* 456 U.S. 918 (1982). This does not mean, however, that the plaintiff's choice of forum is controlling, for its is merely a factor to be considered along with all the other relevant factors. *Garner v. Wolfinbarger*, 433 F.2d 117, 119 (5th Cir. 1970); *Libby v. Russell*, 349 F.Supp. 573 (N.D. Miss. 1972); *see also Rockwell International Corp. v. Eltra Corp.*, 538 F.Supp. 700 (N.D. Ill. 1982). Additionally, where the operative facts of a case have little or no material connection with the forum state, the plaintiff's choice of forum is entitled to less weight than is ordinarily the case. *See Derry Finance N.V. v. Christiana Companies, Inc.*, 555 F.Supp. 1043, 1045 (D. Del. 1983); *Cambridge Filter Corp. v. International Filter Company, Inc.*, 548 F.Supp. 1308, 1311 (D. Nev. 1982); *Clopay Corp. v. Newell Companies, Inc.*, 527 F.Supp. 733, 737-38 (D. Del. 1981); *Coats Company, Inc. v. Vulcan Equipment Co.*, 459 F.Supp. 654 (N.D. Ill. 1978), *Credit Alliance Corp. v. Nationwide Mutual Insurance Co.*, 433 F.Supp. 688, 689 (S.D. N.Y. 1977).

An examination of the pleadings and discovery materials on file before the court reveals that a transfer of this action is warranted. The plaintiff does not reside in this state nor does plaintiff's lead counsel reside in Mississippi. Plaintiff Milton Gluskin is a resident of Bellrose, New York, and this cause of action arose in the State of New York. Few, if any, of the expert or fact witnesses reside in Mississippi, and virtually all of the plaintiff's employment and medical records are located outside of this state. Additionally, plaintiff does not appear to have been employed by a Mississippi company and worked very little, if any, within this state. Furthermore, none of the defendants are incorporated in or have their principle place of business in Mississippi.

In summary, the relationship of the present forum to the totality of the controversy involved in this lawsuit is so minimal that it does not justify retention of the case in the Northern

District of Mississippi. Thus, the convenience of plaintiff, defendants, and their witnesses and the interests of justice would be served by a transfer of this action.

Mississippi has been subject to a deluge of asbestosis cases in the past few years. The Southern District of Mississippi has now become backlogged with such cases, filings now numbering 1,167. As a result, plaintiffs have now begun filing their actions in the Northern District of Mississippi although these actions have little or no connection with this district. Although venue and jurisdiction are proper as to these actions, this court refuses to become a dumping ground for such litigation. We are of the opinion that a transfer of actions having little or no connection with this district will more equitably disperse the burden of this type of litigation.

The main concern voiced by the plaintiff relates to the question of the effect of such a transfer on the statute of limitations applicable to this action.[6] It is well established that upon a transfer of an action pursuant to section 1404(a), the transferee court must act as would the transferor court.[7] The transferee court must apply the choice-of-law rules of the transferor court. Thus, upon a transfer of this action, the transferee court must follow the choice-of-law rules of Mississippi. This choice will include the decision as to whether this action is governed by the Mississippi statute of limitations. *Cowan v. Ford Motor Co.*, 713 F.2d 100, 103 fn 6 (5th Cir. 1982), *reh'g* 719 F.2d 785 (5th Cir. 1983) (citing *Van Dusen v. Barrack, supra); New England Merchants National Bank v.*

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6. The statute of limitations issue is also of great concern to this court. In fact, the court has informed those parties who have inquired regarding the applicable statute of limitations that a transfer of this action would not occur if it were found that plaintiff's action would be barred by the application of the statute of limitations of the transferee forum. As a result, the court has determined that a ruling on the question of the applicable statute of limitations is appropriate prior to a transfer of this action.

7. The application of the law of the transferor forum is not affected by the fact that the action was transferred on the court's own motion. *Roofing & Sheet Metal Service v. LaQuinta Motor Inns*, 689 F.2d 982 (11th Cir. 1982), *Martin v. Stokes*, 623 F.2d 496 (6th Cir. 1980); *Bott v. American Hydrocarbon Corp.*, 441 F.2d 896 (5th Cir. 1971).

Rosenfeld, 679 F.2d 467 (5th Cir. 1982); *Roofing & Sheet Metal Service v. LaQuinta Motor Inns*. 689 F.2d 982 (11th Cir. 1982); *Walker Corp. v. Burger Chef Systems*, 554 F.2d 1165 (D.C. 1977); *Farham v. Edwards*, 470 F.2d 1000 (5th Cir. 1973); *Railing v. United Mine Workers of America*, 429 F.2d 780 (4th Cir. 1970); *Carr v. American Universal Insurance Co.*, 341 F.2d 220 (6th Cir. 1965); *H. L. Green Company v. MacMahon*, 312 F.2d 650 (2nd Cir. 1962); *Headrick v. Atchison T & S Railroad*, 182 F.2d 305 (10th Cir. 1950).

"As a rule, Mississippi treats statutes of limitation as procedural, and in keeping with the accepted practice of applying procedural rules of the forum state irrespective of the choice of substantive law, the state courts generally enforce Mississippi's limitation periods and not those of foreign jurisdictions." *Cummings v. Cowan*, 390 F.Supp. 1251, 1254 (N.D. Miss. 1975). *See also Kenshaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969); *Steele v. G. D. Searle & Co.*, 422 F.Supp. 560 (S.D. Miss. 1976), *reh'g granted* 428 F.Supp. 646 (S.D. Miss. 1977). Accordingly, in Mississippi courts will normally apply the *lex fori* insofar is it relates to the Mississippi statute of limitations. *See Steele, supra; Bethlehem Steel Co. v. Payne*, 183 So.2d 912, 916 (Miss. 1966). Thus in the action *sub judice*, upon transfer, the Mississippi statute of limitations will govern the rights of the parties.[8] *See Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 794 (10th Cir. 1979) (the Mississippi statute of limitations governed the rights of the parties in an action transferrred from Mississippi to Kansas). The rights of the parties to this action will, therefore, be unaffected by a transfer of this action. The court thus finds that a transfer of this cause is warranted.

An order in conformity with this opinion shall issue.

This 15th day of March, 1984.

CHIEF JUDGE

8. The statute of limitations applicable to this action is not affected by the Mississippi Borrowing Statute, MISS CODE ANN. §15-1-65. *See Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982), *reh'g en banc* 713 F.2d 100, *reh'g* 719 F.2d 785 (5th Cir. 1983).

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No. 87-477

In The
Supreme Court of the United States
October Term, 1987

—o—

ALBERT J. FERENS & MARGARET L. FERENS,
His Wife,

Petitioners,

v.

DEERE & COMPANY,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTION PRESENTED FOR REVIEW

Where petitioners filed a personal injury action in Mississippi for the sole purpose of exploiting that state's six year statute of limitations, and then moved for transfer pursuant to 28 U.S.C. § 1404(a) to the only forum having any recognizable interest in application of its laws to the action, did the transferee district court err by applying the transferee forum's statute of limitations to grant summary judgment in respondent's favor?

PARTIES TO THE PROCEEDING

Respondent is satisfied with the petitioners' presentation of the list of parties to the proceeding. Pursuant to Rule 28.1 respondent states that it has no affiliates or parent company, and no subsidiaries other than those which are wholly owned.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW AND JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. SPECIAL AND IMPORTANT REASONS DO NOT EXIST TO JUSTIFY THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI	5
II. THE GRANTING OF SUMMARY JUDGMENT IN RESPONDENT'S FAVOR WAS PROPER	8
A. The Third Circuit's constitutional analysis was correct	8
B. Proper implementation of 28 U.S.C. § 1404(a) requires application of Pennsylvania's statute of limitations	11
C. The constitutional requirements of federalism, as enunciated in *Erie R.R. v. Tompkins*, compel application of Pennsylvania's statute of limitations	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 9, 11

Christmas v. Russell, 72 U.S. 290 (1866) 13

Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir. 1982) 5

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 3, 4, 5, 10, 12, 13

Goad v. Celotex Corp., No. 86-3540, slip op. (4th Cir. October 16, 1987) 6

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 10, 12

Headrick v. Atchison, T.&S.F. R.R., 182 F.2d 305 (10th Cir. 1950) 11

Home Insurance Co. v. Dick, 281 U.S. 397 (1930) 9

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 10

Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941) 12

Koontz v. International Harvester Co., appeal docketed, No. 87-1371 (3rd Cir. July 2, 1987) 5

McVicar v. Standard Insulations, Inc., 824 F.2d 920 (11th Cir. 1987) 5

Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 12

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 11

Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979) 5

Shewbrooks v. A.C.&S., Inc., No. 56,014, slip op. (Miss. August 19, 1987) 7

Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) 9

TABLE OF AUTHORITIES—Continued

Page

White v. Malone Properties, Inc., No. 55,195, slip op. (Miss. March 12, 1986) *withdrawn* 494 So. 2d 576 (Miss. 1986) 6

Van Dusen v. Barrack, 376 U.S. 612 (1964) 4, 5, 11

STATUTES

28 U.S.C. § 1404(a) 2, 3, 4, 6, 11, 13

Miss. Code Ann. § 15-1-49 (1972) 2

Miss. Code Ann. § 15-1-65 (1972) 1

42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981) 2

RULES OF COURT

Fed. R. Civ. P. 54(b) 3, 8

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 142 (1986 REVISIONS) 12

ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) 12

OPINIONS BELOW AND JURISDICTION

Respondent is satisfied with the petitioners' presentation of the opinions below and grounds on which the jurisdiction of this Court is invoked.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in the petition, this case involves Miss. Code Ann. § 15-1-65 (1972) which provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or some other state or country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

STATEMENT OF THE CASE

On July 5, 1982, Albert J. Ferens was injured while cleaning a combine manufactured by Deere & Company. The accident occurred on petitioners' farm in Pennsylvania. Mr. and Mrs. Ferens are Pennsylvania residents. Mr. Ferens purchased the combine in Pennsylvania. On July 3, 1985, petitioners filed an action in the United States District Court for the Western District of Pennsylvania seeking damages for Mr. Ferens' injuries based on various breach of warranty theories.

On July 25, 1985, petitioners filed an action in the United States District Court for the Southern District of Mississippi seeking damages for the injuries sustained in the July 5, 1982 accident based on theories of negligence and strict liability. The Mississippi statute of limitations for such actions is six years. Miss. Code Ann. § 15-1-49 (1972). Pennsylvania's two year statute of limitations would have barred the petitioners' negligence and strict liability action had the action been filed there. 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981). Respondent filed an Answer to the Mississippi action which denied liability and raised the defense of statute of limitations. Prior to initiating any discovery or otherwise attempting to prosecute the action in Mississippi, petitioners filed a motion to transfer that action to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). The motion was supported by an affidavit signed by Mr. Ferens which stated, *inter alia*, that:

(1) The combine was purchased in Pennsylvania and continued to be located in Pennsylvania;

(2) The accident occurred in Pennsylvania;

(3) "All witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania"; and

(4) "All documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania."

Petitioners' motion was granted on November 8, 1985.

Following transfer the Mississippi action and the Pennsylvania action were consolidated on petitioners' motion. Thereafter, respondent moved for summary judgment in both actions. The motion for summary judgment in the negligence and products liability (Mississippi) action was based on respondent's contention that, under the particular facts of the case, proper implementation of 28 U.S.C. § 1404(a), as well as the constitutional principles enunciated in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), required application of Pennsylvania's statute of limitations. The district court granted that motion for summary judgment, holding that to apply Mississippi's statute of limitation would be to countenance a "judicial juggling act between forums—one with a clear interest in the litigation and one whose interest is nominal at best." 639 F. Supp. at 1492. The district court denied, without prejudice, respondent's motion for summary judgment as to the breach of warranty (Pennsylvania) action.

In order to obtain immediate review of the district court's ruling on the statute of limitations issue, petitioners filed a "motion for certification and final judgment upon less than all claims pursuant to rule 54(b) and request for stay of further proceedings . . .". The district court granted that motion. On appeal a panel of the United States Court of Appeals for the Third Circuit affirmed the district court in a 2-1 decision. The majority's opinion held that granting of summary judgment was proper because application of Mississippi's statute of limitations to a cause of action having no connection with Mississippi, apart from the fortuitous circumstance that respondent did business there, violated the due process and full faith and credit clauses of the United States Constitution. The court

concluded that "Mississippi's contacts with the parties and the occurrence or transaction are plainly so insignificant that the application of its law would be arbitrary, fundamentally unfair, and therefore unconstitutional." The panel's opinion did not dispose of respondent's contentions that the granting of summary judgment was also correct based on the proper implementation of 28 U.S.C. § 1404(a) and based on the constitutional constraints of federalism recognized in *Erie R.R. v. Tompkins*, and its progeny. Petitioners' petition for rehearing and rehearing en banc was denied on July 9, 1987.

SUMMARY OF ARGUMENT

Special and important reasons do not exist to justify the granting of the Petition for a Writ of Certiorari. There are significant factual differences between the present case and the two with which it nominally conflicts. Those differences give rise to two strong alternative grounds for affirming the summary judgment in respondent's favor. The conflict may be eliminated by the Third Circuit, which has been asked to reconsider the question raised by petitioners in another appeal now pending before it. The interest which petitioner seeks to have vindicated is not of a magnitude which merits exercise of this Court's discretionary review.

The Third Circuit correctly concluded that application of Mississippi's statute of limitations would violate the due process and full faith and credit clauses of the Constitution where the action's only contact with Mississippi was the fact that respondent did business there. Proper implementation of 28 U.S.C. § 1404(a), in light of that statute's purpose and the Court's analysis in *Van*

Dusen v. Barrack, 376 U.S. 612 (1964), requires application of Pennsylvania's statute of limitations. The constitutional principles of federalism which were enunciated in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) compel the application of Pennsylvania's statute of limitations under the particular facts of this case.

ARGUMENT

I. SPECIAL AND IMPORTANT REASONS DO NOT EXIST TO JUSTIFY THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI.

The petition correctly states that the Third and Fifth Circuits have reached different conclusions on the question of whether a forum's statute of limitation constitutionally may be applied to a cause of action whose only contact with the forum is the fact that the defendant is subject to personal jurisdiction there. Subsequent to filing of the petition, the Fourth Circuit has reached a conclusion in accord with that of the Fifth Circuit, albeit not in a case involving Mississippi's statute of limitations. *Goad v. Celotex Corp.*, No. 86-3540, slip op. (4th Cir. October 16, 1987). (The cases of *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979) and *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987), cited in the petition, did not address the constitutional question which petitioners seek to have reviewed.) Respondent believes, however, that in the context of the facts of this case the question presented is not sufficiently ripe to justify review at this time. Neither *Cowan*, nor *Goad* involved the question of whether the initial forum's statute of limitations should be applied following a plaintiff-initiated § 1404(a) transfer. As demonstrated in the second

section of respondent's argument, there are two sound reasons why the granting of summary judgment in respondent's favor should be sustained, even apart from the constitutional analysis applied by the Third Circuit. Furthermore, the Third Circuit has been asked to reconsider its analysis in a case which is now pending before it, *Kooniz v. International Harvester Co. appeal docketed*, No. 87-1371 (3rd Cir. July 2, 1987).

Respondent also questions whether, as a matter of sound judicial policy, the interest asserted by petitioners—the alleged right to capture the favorable statute of limitations of a remote forum so as to avoid the barring of a stale claim, while contemporaneously manipulating 28 U.S.C. § 1404(a) so as to have the action tried in the forum where it arose and where it would be time-barred—constitutes the sort of interest which the Court should vindicate by exercise of its discretionary powers of review. Recent opinions by the Mississippi Supreme Court indicate that it will soon put an end to that jurisdiction's status as a dumping ground for stale tort claims. Thus, in *White v. Malone Properties, Inc.*, No. 55,195, slip op. (Miss. March 12, 1986), the Mississippi Supreme Court held that it would adopt the "center of gravity" conflicts of law approach to determine the applicable statute of limitations for actions arising outside of Mississippi. The Mississippi Supreme Court later withdrew its original slip opinion and substituted an opinion which sustained the result originally reached by it in that case, but on other grounds. *White v. Malone Properties, Inc.*, 494 So.2d 576 (Miss. 1986). The reported opinion does not indicate why the original opinion was withdrawn. A concurring opinion adopted by two members of that court indicated that they would adhere to the view that the center of gravity

analysis should apply to determine the applicable statute of limitations.

A subsequent case, *Shewbrooks v. A.C.&S., Inc.*, No. 56,014 slip op. (Miss. August 19, 1987) indicates that the Mississippi Supreme Court remained troubled by its "generous statutes of limitations [that] make its courts highly attractive to dilatory plaintiffs and forum-shoppers." *Id.* slip op. at 4. In *Shewbrooks* the court dismissed the action on forum non conveniens grounds because the action involved foreign plaintiffs and defendants and a foreign cause of action. The court also noted that "Justice Robertson's concurring opinion in *White v. Malone Properties, Inc.*, 494 So.2d at 582-83, contains an eloquent discussion of these problems. It may be that in the future, our trial judges will make more frequent use of their sound discretion to dismiss actions unrelated to Mississippi for forum non conveniens. If so, this Court will not lightly second-guess them. We are not eager to see Mississippi become a dumping ground for the nation's homeless litigation." *Id.* slip op. at 4-5. Respondent respectfully suggests that Mississippi already is such a dumping ground, but that its supreme court is on the way to ending that status. The likelihood of such action by the Mississippi Supreme Court minimizes whatever justification may presently exist for viewing this matter as involving special and important concerns.

Finally, respondent would note that petitioners are not completely foreclosed from recovery for Mr. Ferens' injuries by the Third Circuit's decision. Petitioners' action to recover based on breach of warranty is still pending in the district court. Petitioners may recover by way

of verdict or settlement in that action, in which case granting review would turn out to have been a needless exercise. Although petitioners were within their rights in moving to seek immediate review by filing of their rule 54(b) motion, the pendency of the breach of warranty action certainly may be considered in deciding whether or not it is provident to grant the petition for writ of certiorari.

II. THE GRANTING OF SUMMARY JUDGMENT IN RESPONDENT'S FAVOR WAS PROPER.

A. The Third Circuit's constitutional analysis was correct.

The Third Circuit concluded that "Mississippi's contacts with the parties and the occurrence or transaction are plainly so insignificant that the application of its law would be arbitrary, fundamentally unfair, and therefore unconstitutional. . . . Consequently, because Mississippi could not apply its own law to the Ferenses' suit against Deere if the suit were pending in a Mississippi state court, neither *Klaxon* nor *Barrack* require that a federal diversity forum do so either." 819 F.2d at 427. Respondent sees no point in merely parroting the cogent analysis which led the Third Circuit to its conclusion. Rather, respondent will address petitioners' contentions that the Third Circuit's analysis is contrary to this Court's decisions.

The petition appears to suggest that because statutes of limitations were historically regarded as procedural, rather than substantive, in nature those statutes are not subject to any constitutional constraints. That suggestion is not supported by the cases cited in the petition. The cases cited therein simply acknowledge the historical con-

flict of laws principle, whose continued vitality has been questioned increasingly during the past two decades, that limitation of actions is routinely governed by the lex fori. As stated in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), states' adoption of conflict of laws rules is "subject to the full faith and credit clause and other constitutional restrictions." 345 U.S. at 516. Prominent among those other constitutional restrictions is the fourteenth amendment. Both *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930) and *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) recognize that the fourteenth amendment restricts the ability of states to apply their own statutes of limitation to causes of action whose contacts with the forum state are either highly attenuated or non-existent.

With one exception, the cases cited at pages eleven and twelve of the petition all sustained application of a statute of limitations or a contractual provision to bar collection of a judgment or prosecution of a cause of action. To the extent that certain statements in those cases, when taken out of context, may appear to support petitioners' claim that application of Mississippi's statute of limitations is sacrosanct, respondent believes that those cases are inapposite. Indeed, the cases may actually be read to support respondent. That is because respondent denies that Mississippi is entitled to be treated as a "forum" under the particular circumstances of this action. Under any realistic view of the case, Pennsylvania is the only true forum. The case's transient presence in Mississippi should be regarded as a nullity.

The wooden approach followed by petitioners, whereby complex conflicts of law issues are resolved by treating the

terms "substantive" and "procedural" as shibboleths, was discarded by this Court many years ago. Thus, in clarifying the constitutional dimensions of federalism which were announced in *Erie R.R. v. Tompkins, supra*, the Court has explained:

> It is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitality the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal courts should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)

The fact that Mississippi state courts historically have regarded that state's statute of limitations as procedural cannot foreclose inquiry into the constitutionality of applying its statute of limitations under the facts of a given case.

Similarly, petitioners' argument that existence of contacts sufficient to satisfy due process constraints on exercise of personal jurisdiction, necessarily surmounts due process barriers to application of a forum's statute of limitations is plainly wrong. These two aspects of due process were expressly distinguished in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n. 10 (1984). (Noting

"considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation.") "The Court has recognized that examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes." *Allstate Insurance Co. v. Hague, supra,* 449 U.S. at 317 n. 23. The holding of *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985) is to the same effect.

B. Proper implementation of 28 U.S.C. § 1404 (a) requires application of Pennsylvania's statute of limitations.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Court expressly reserved judgment on the question of whether the transferor forum's choice of law would apply following transfer on plaintiff's motion pursuant to 28 U.S.C. § 1404(a). (*Van Dusen's* citation of *Headrick v. Atchison, T.&S. F. R.R.*, 182 F.2d 305 (10th Cir. 1950) does not avail petitioners in light of that reservation. *Headrick* involved a motion for transfer by defendant and did not address any of the constitutional issues raised in the present action.) A principal concern of the Court in *Van Dusen v. Barrack* was to avoid transformation of § 1404(a) into a forum-shopping vehicle utilized by the moving party to capture favorable law. 376 U.S. at 636. Petitioners can hardly deny that their sole purpose in filing this action in Mississippi was to exploit Mississippi's six year statute of limitation, with the expectation that the case would be transferred to the most convenient forum. 28 U.S.C. § 1404 (a) was never intended to serve such a purpose. Rather, § 1404(a) was designed to mitigate the harsh consequences

which flowed from dismissals under the doctrine of forum non conveniens. *Norwood v. Kirkpatrick,* 349 U.S. 29 (1955). Various commentators, as well as the American Law Institute, have taken the view that application of the transferee forum's choice of law is desirable following transfer pursuant to plaintiff's § 1404(a) motion. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 142 (1986 Revisions). (Action barred by the forum's statute of limitations or by that of another state which "has a more significant relationship to the parties and the occurrence", whichever is shorter.)

C. The constitutional requirements of federalism, as enunciated in Erie R.R. v. Tompkins, compel application of Pennsylvania's statute of limitations.

Erie R.R. v. Tompkins, supra, held that limitations inherent in the Constitution required federal courts to apply the decisional law of the forum state within which the federal court was situated, when deciding cases in which jurisdiction was based on the parties' diversity of citizenship. Subsequent cases have interpreted *Erie,* and the constitutional analysis on which it was grounded, to require application of the forum state's statute of limitations, *Guaranty Trust Co. v. York, supra,* and conflict of laws rules, *Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487 (1941). Respondent submits that the constitutional principle recognized by those cases compels the application of Pennsylvania's statute of limitations in the present action. Had this action been filed in Pennsylvania, it would have been barred by Pennsylvania's statute of limitations. If

respondent's position is accepted, then the twin "accidents" of diversity jurisdiction and the existence of 28 U.S.C. § 1404(a) will require the United States District Court for the Western District of Pennsylvania to determine the outcome of this case (so far as the statute of limitations is concerned) in a manner completely contrary to the result that would have been reached by Pennsylvania state courts. The practical effect of this Court's accepting petitioner's contentions regarding § 1404(a) would be to adopt a six year federal statute of limitations for all tort claims in which diversity jurisdiction exists and defendant has minimum contacts with Mississippi. Such a result violates not only the teaching of *Erie v. Tompkins*, but also the full faith and credit clause as interpreted in *Christmas v. Russell*, 72 U.S. 290 (1866).

CONCLUSION

For the foregoing reasons, respondent requests that the Petition for a Writ of Certiorari to the United States Court of Appeal for the Third Circuit be denied.

Respectfully submitted,

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v.

DEERE & COMPANY,
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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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TABLE OF CITATIONS

Page(s)

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 2

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 3

Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir. 1982) 1

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1934) .. 4

Ferens v. Deere, 819 F.2d 423 (3rd Cir. 1987) 3

Goad v. Celotex Corp., No. 86-3540 (4th Cir. Oct. 16, 1987) 1, 3, 4

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 2, 4

Koontz v. International Harvester Co., appeal docket No. 87-1371 (3rd Cir. July 2, 1987) 5

Phillips Petroleum Co. v. Shutts, ____ U.S. ____, 105 S. Ct. 2965 (1985) 3

Shewbrooks v. A.C. & S., Inc., No. 56, 014 slip op. (Miss. August 19, 1987) 4

Wortman v. Sun Oil Co., No. 87-352 1

STATUTES, RULES, REGULATIONS

28 U.S.C. §1404(a) 4

No. 87-477

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALBERT J. FERENS & MARGARET L. FERENS, His Wife,
Petitioners

v.

DEERE & COMPANY,
Respondent

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Following the filing of the Petition for a Writ of Certiorari, the United States Court of Appeals for the Fourth Circuit handed down its decision in *Goad v. Celotex Corp.*, No. 86-3540 (4th Cir. Oct. 16, 1987). (The Fourth Circuit opinion appears in the Appendix hereto at A-1.)[1] The Fourth Circuit Court of Appeals decided the Constitutional issue directly contrary to the Third Circuit Court of Appeals in the instant case, creating another clear conflict within the circuits.[2] The Fourth Circuit opinion,

1. This Court has granted the writ of certiorari in *Wortman v. Sun Oil Co.*, No. 87-352. Petitioners believe that that case may also involve the issue of whether the due process and full faith and credit clauses prohibit the application of a forum state's statute of limitations to a cause of action arising in a state with a shorter limitations statute.

2. Also in conflict with the Third Circuit on the Constitutional issue is *Coucan v. Ford Motor Co.*, 694 F. 2d 104 (5th Cir. 1982).

which is to be published, reaffirmed petitioners' position on every important point. It held:

> 1. That the distinction between procedural and substantive law is critical to the issue of whether a forum's choice of law is Constitutional and that the Constitution does not bar the forum's choice of its own procedural rules, including its statute of limitations. A-6-7, A-9.
>
> 2. That statutes of limitations are matters of policy, set by the legislature, concerning the degree of access to the courts, and that they do not confer upon tortfeasors a right to be relieved of liability, and that they are to be distinguished from statutes that make the time within which a suit can be filed a substantive part of a plaintiff's cause of action. A-5-6, A-9.
>
> 3. That if the defendant has sufficient contacts with the original forum to be subject to its jurisdiction, then it cannot claim that application of that forum's procedural rules, including the statute of limitations, constituted unfair surprise offensive to due process. A-10.
>
> 4. That the opportunity for an injured plaintiff to shop for a favorable statute of limitations in a distant jurisdiction, if indeed it is a situation needing correction, is a matter for legislative attention. It does not rise to a Constitutional problem and is therefore not a concern for the courts. A-8, n.12.

Respondent is plainly incorrect in its assertion that the distinction between substance and procedure "was discarded by this Court many years ago." Brief in Opposition at 10. Indeed, the Supreme Court case upon which the Third Circuit relied, which was decided long after respondent's supposed authority of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), explicitly referred to "*substantive*" law. As stated in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981):

> This court granted certiorari to determine whether the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause of Art. IV, §1, of the United States Constitution bars the Minnesota Supreme Court's choice of *substantive* Minnesota law to govern the effect of the provision in an insurance policy issued to respondent's decedent. [Emphasis supplied, footnotes omitted.]

Id., at 305.

> The lesson from *Dick* and *Yates*, which found insufficient forum contacts to apply forum law, and from *Alaska Packers*, *Cardillo*, and *Clay II*, which found adequate contacts to sustain the choice of forum law, is that for a State's *substantive* law to be selected in a constitutionally permissible manner, that State must have significant contact or significant aggregation of contacts, creating state interest, such that choice of its law is neither arbitrary nor fundamently unfair. [Emphasis supplied, footnotes omitted.]

Id., at 313-314. Accord, *Goad v. Celotex Corp.*, *supra*; *Ferens v. Deere*, 819 F. 2d 423, 427-429 (3rd. Cir. 1987) (Seitz J. dissenting).[3]

The distinction between substance and procedure is important because substantive law, unlike procedural law, regulates conduct. Substantive tort law, for instance, imposes a duty of care upon potential tortfeasors and is intended to deter harmful conduct. Hence, there may be a violation of the due process and full faith and credit clauses if the forum state applies its substantive law to conduct taking place in distant jurisdictions, especially if the forum state lacks contacts to the cause of action. But the same analysis does not apply to procedural law since procedural rules, including limitations statutes, do not attempt to

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3. This court also referred explicity to *substantive* law in *Phillips Petroleum Co. v. Shutts*, —— U.S. ——, 105 S. Ct. 2965, 2977 (1985). See also *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), cited in *Goad v. Celotex*, *supra* at A-6-7.

reach beyond the forum state to regulate a person's or entity's conduct. See *Goad* v. *Celotex*, *supra*, at A-7, 10.

As the respondent's excerpt from the *Guaranty* opinion makes plain, that decision reaffirms *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1934) by allowing that a federal court applying state substantive law should apply the forum state's statute of limitations, so that the federal court result would be consistent with the state court result. This Court should review the instant case in order to maintain the consistency required by *Erie* and *Guaranty Trust*. Under the Court of Appeals decision, cases transferred to the Third Circuit under 28 U.S.C. §1404(a) would have a result different from cases filed in a Mississippi state court or the state court of any jurisdiction having a longer statute of limitations than a state within the Third Circuit.[4]

The respondent's discussion of *Shewbrooks* v. *A.C. & S., Inc.*, No. 56, 014 slip op. (Miss. August 19, 1987) and its argument that the Mississippi Supreme Court is on the way to ending Mississippi's status as a litigation "dumping

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4. Respondent is incorrect in its argument that *Erie* requires application of the Pennsylvania statute. Its argument is that the result in the Pennsylvania federal court should be the same as in a Pennsylvania state court. That argument, however, ignores the fact that the claims were originally brought in Mississippi, not Pennsylvania, and that the federal court is, therefore, obligated under *Erie* to reach a result consistent with the *Mississippi* state court system.

Respondent attempts to rewrite the facts of the case. As stated in the Brief in Opposition at 9:

> . . . respondent denies that Mississippi is entitled to be treated as a "forum" under the particular circumstances of this action. Under any realistic view of the case, Pennsylvania is the only true forum. The case's transient presence in Mississippi should be regarded as a nullity.

The initial filing in Mississippi, however, is a reality. Respondent begs the question by arguing that the case's original presence in Mississippi should be ignored. Moreover, ignoring the case's presence in Mississippi would undercut the acknowledged purpose of 1404 to prevent dismissal under the common law doctrine of forum non conveniens, under respondent's analysis, the instant case would be dismissed on forum non conveniens grounds.

ground" misses the point. The point is that the Third Circuit Court of Appeals has ruled on a Constitutional question — petitioners believe it has ruled incorrectly — and has created a conflict within the circuits needing resolution. That the Mississippi Supreme Court in *Shewbrooks* dismissed a case on forum non conveniens grounds is irrelevant. That the Mississippi judiciary is unhappy with the length of that state's statute of limitations, which is a creation of the Mississippi legislature, is also irrelevant. A ruling from the Mississippi Supreme Court, which respondent would like to think is imminent, would also be irrelevant, as it would not resolve the conflict. A final decision on the Constitutional question will not be obtained by waiting and hoping for the Mississippi Supreme Court to do something.[5]

That the plaintiff in the instant case, instead of the defendant, moved for transfer under 1404(a) does not form a basis for denying the petition for certiorari. The Court of Appeals opinion applies to cases wherein either the defendant or the plaintiff moves for transfer. Moreover, the Court of Appeals opinion applies to cases wherein there is no motion for transfer or that are originally filed in Mississippi state court, for it holds that application of the Mississippi statute of limitations to cases properly brought in Mississippi may be unconstitutional irrespective of motions to transfer.

For the foregoing reasons, petitioners respectfully submit that a writ of certiorari should issue to review the

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5. Similarly, waiting for the Court of Appeals to rule contrary to its decision in the instant case in *Koontz v. International Harvester Co.* appeal docketed, No. 87-1371 (3rd Cir. July 2, 1987) would serve little purpose. The Court of Appeals already denied a Motion for Reconsideration in the instant case. Moreover, in *Koontz*, the Court of Appeals declined to hear the appeal en banc. It is inconceivable that one panel of the Third Circuit will overrule another.

To the extent that this Court deems a Third Circuit opinion in *Koontz* pertinent to its decision to accept certiorari, it should stay the certiorari decision pending a ruling in *Koontz*.

opinion and judgment of the United States Court of Appeals for the Third Circuit entered on July 9, 1987.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3540

WILEY GOAD,

Plaintiff/Appellee,

and

NOMIA GOAD,

Plaintiff,

versus

CELOTEX CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLASS CORPORATION; KEENE CORPORATION; H. K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION,

Defendant/Appellant,

and

JOHNS MANVILLE SALES CORPORATION; ARMSTRONG CORK COMPANY; GAF CORPORATION; UNARCO INDUSTRIES, INC.; PITTSBURGH CORNING CORPORATION; OWENS-ILLINOIS, INC.; FORTY-EIGHT INSULATIONS, INC.; MUNDET CORK CORPORATION; CROWN CORK & SEAL COMPANY, INC.; RAYBESTOS-MANHATTAN, INC.,

Defendant,

Appeal from the United States District Court for the Western District of Virginia, at Roanoke, Jackson L. Kiser, District Judge. (CA 84-600-R)

Argued January 8, 1987 Decided October 16, 1987

Before WIDENER and MALL, Circuit Judges, and SENTELLE, United States District Judge for the Western District of North Carolina, sitting by designation.

Archibald Wallace, III (Nathan H. Smith; Allan M. Heyward, Jr.; Sands, Anderson, Marks & Miller, on brief) for Appellants; Charles Alan Wright (Robert R. Hatten; Pattan, Wornom & Watkins; Richard S. Glasser; Glasser & Glasser; Joel I. Klein; Richard G. Taranto; Onek, Klein & Farr; Gary Wheeler Kendall; Michie, Hamlett, Donato & Lowry, on brief) for Appellee.

WIDENER, *Circuit Judge:*

The defendants in this case, manufacturers of asbestos products, brought this interlocutory appeal from the decision of the district court granting the plaintiffs' motion to apply the Texas statute of limitations to this action. We affirm the order of the district court.

The plaintiffs, Wiley and Nomia Goad, instituted this diversity action in federal district court for the Eastern District of Texas, seeking recovery for injuries sustained by Wiley Goad from exposure to the defendants' products. Goad worked as an insulator for more than 20 years, and he claims to have been exposed to asbestos in at least seven eastern states,[1] plus the District of Columbia. He has never worked in Texas, and is a resident of Virginia. Upon learning of Goad's injuries, the Goads brought suit in the Texas federal district court. Texas applies what is called the discovery rule to actions for personal injury, so that a cause of action does not accrue until a person knows or reasonably could become aware of his injury. Plaintiffs conceive that, had this action been brought in Virginia, it would have a better chance to be barred, since the applicable Virginia statute did not embrace a discovery rule until

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1. Goad claims to have been exposed to asbestos in Virginia, West Virginia, North Carolina, Ohio, Kentucky, Maryland and Tennessee.

1985.[2] We need not decide that question, however. All of the defendants have marketed their products in Texas, and there is no question that they are all subject to personal jurisdiction in Texas. In addition, venue was proper under 28 U.S.C. §1391(c).[3] Nevertheless, the case was transferred, over plaintiffs' objection, to the Western District of Virginia under 28 U.S.C. §1404(a), which permits transfers "[f]or the convenience of parties and witnesses, in the interest of justice."

Upon the transfer from Texas to Virginia, plaintiffs filed their motion, asking that the district court apply the Texas statute of limitations. The district judge granted the motion, and defendants appeal that order.

In arguing that the Virginia statute ought to apply to this action, rather than the Texas statute, defendants maintain that both the due process clause of the Fourteenth Amendment and the full faith and credit clause[4] require that *every* choice of law decision made by a state court be supported by "significant contacts" between the litigation and the state whose law is chosen. Their position is in direct opposition to the traditional rule that, in considering the appropriate statute of limitations in a case such as this, the law of the forum applies. The defendants assert that the precise question in this case, the constitutionality of what defendants call a contactless forum state's application of its own longer statute of limitations, has never been addressed by the Supreme Court. However, they say a recent Supreme Court case has cast doubt upon the traditional rule, and they urge us to find that the choice of Texas' statute of limitations in this case violates the federal Constitution. For the reasons set forth below, we find the defendants' argument to be without merit.

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2. Va. Code §8.01-249(4), but cf. *Locke v. Johns-Manville Corp.*, 221 Va. 921, 275 S.E.2d 900 (1981).

3. 28 U.S.C. §1391(c) provides that venue for a corporation is proper in any district "in which it is incorporated or licensed to do business or is doing business. . . ."

4. United States Constitution, Art. IV, §1.

Aside from the defendants' constitutional claim, there is no dispute but that the Texas statute of limitations applies to this action. The case was filed in a federal district court in Texas, where both personal jurisdiction and venue were proper. Subject-matter jurisdiction was based on diversity of citizenship, 28 U.S.C. §1332. The district court in Texas was then obliged to make the same choice of law as would a Texas state court, *Klaxon v. Stantor Electric Manufacturing Co.*, 313 U.S. 487 (1941), including the choice of a statute of limitations. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). When venue was transferred to the Western District of Virginia,[5] the district court in Virginia was obliged to apply the same law that would have been applied by the Texas district court; only a change of courtrooms was effected. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).[5] Since the Texas state courts would apply Texas' own statute of limitations to this action,[6] under the traditional rule that the law of the forum applies to matters of procedure, the federal court in Virginia was required to apply the Texas statute.

Defendants do not contest the correctness of the preceding analysis, nor do they challenge the continuing vitality of the cases supporting it. Therefore, defendants' claim resolves itself to the proposition that the federal Constitution would prohibit a Texas state court from applying Texas' statute of limitations to this action.[7] We

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5. *Van Dusen* held that a change of venue under 28 U.S.C. §1404(a) would not alter the applicable law in a case.

6. See, e.g., *California v. Copus*, 158 Tex. 196, 309 S.W.2d 227, cert. denied, 366 U.S. 967 (1958). Neither *Klaxon* nor *Guaranty Trust* relied upon a substantive/procedural distinction but squarely upon *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Texas court did follow that distinction, but that is not material here. What is material is that the Texas courts would have applied the Texas statute of limitations.

7. Their brief, p. 4, admits this much, although the factual premise in the brief, p. 28, is not accurate in that it assumes, contrary to the record, that the *defendants* had no significant contact with the Texas forum. The defendants' contacts with Texas were not only

think defendants' arguments, however, rest on a fundamental misunderstanding of the nature of statutes of limitation.

Statutes of limitation represent a public policy judgment by a State as to the time at which an action becomes too stale to proceed in its courts. States rightly may be concerned about the prosecution of fraudulent claims and reliability of judgments rendered upon old claims, where memories may have faded, witnesses may have died, and evidence may have been lost. It has also been said that statutes of limitation also serve the interest of allowing defendants to rest assured that, after a certain period of time, their exposure to liability has ended. See, e.g., *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 118-19 (D.C. Cir. 1982). It is felt, and we agree, that the principal purpose of limiting statutes is the prevention of stale claims, and that the repose of defendants is merely an incidental benefit of such statutes. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Statutes of limitation, then, are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability,[8] although this may be their effect.[9]

In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago. Statutes of

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significant; they must be assumed to be in vast numbers. It is true, however, that this particular litigation has no contact with the Texas forum.

8. "[Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

9. Of course, where the discovery rule is in effect, the argument that the statute ensures anyone's repose is at least of less force.

repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action. See, e.g., *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982). In other words, where a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law. The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws. Statutes of repose are meant to be "a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights." *Bolick*, 293 S.E.2d at 418, quoting Stevenson, *Products Liability and the Virgina Statute of Limitations — A Call for the Legislative Rescue Squad*, 16 U.Rich.L.Rev. 323, 334 n. 38 (1982). Statutes of limitation serve interests peculiar to the forum, and are considered as going to the remedy and not the fundamental right itself. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).[10] Virginia treats its relevant statute of limitations as bearing on the remedy and not on the plaintiff's right itself. *Burk's Pleading and Practice*, §231 (1982).

Contrary to defendants' assertion, this distinction does not exalt form over substance, nor does it subject the Constitution to the whims of the States in labeling their laws. Certainly, the labels applied by States do not control the outcome of constitutional adjudication. But, as the Supreme Court has recognized, the labels serve a useful purpose in describing the various interests underlying the two types of laws. "The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a

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10. The Supreme Court has adopted the view that statutes of limitation go to remedies rather than rights in *Campbell v. Holt*, 116 U.S. 620 (1885), and declined, in *Chase Securities*, to overrule *Campbell*. Of particular interest here is that in *Chase Securities* the Court rejected a Fourteenth Amendment challenge based on retroactivity, when Minnesota had retroactively given new life to a cause of action presently barred by a statute of limitations.

workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." *Chase Securities Corp. v. Donaldson*, 325 U.S. at 314.

Procedural rules protect the interest of the courts in the reliability of judgments, and in managing the progress of cases before them. They express the public policy of the forum State in granting or denying access to its courts. Substantive laws reflect a State's determination of the proper relationship between the people and property within its boundaries. The States are not strangers to the use of statutes of repose as a means of protecting manufacturers from liability for remote acts.

Full Faith and Credit

There is no authority to support the theory that the full faith and credit clause limits the ability of a forum States to apply its own statute of limitations to a cause of action created by another State. To the contrary, the Court has explicitly decided and stated that ". . . the Full Faith and Credit Clause does not compel the forum state to use the period of limitations of a foreign state." *Wells v. Simonds Abrasive Co.*, 348 U.S. 514, 517 (1983).

Since a statute of limitations serves primarily to protect the public policy of the forum State in not entertaining stale cases, we do not think that failure to apply the Virginia statute of limitations to this case impairs any interest of Virginia's. Virginia considers its relevant statute of limitations to be procedural, and has not enacted a statute of repose to protect vendors of asbestos.[11] Defen-

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11. As noted, Virginia, however, in 1985, enacted a statute utilizing a kind of discovery rule for asbestos related injuries. Va. Code §5.01-249(4) (1985). Prior to that, in 1981, the Virginia Court had held that, in an asbestos related cancer case, the statute of limitations started to run when the tumor appeared (when the injury occurred) rather than from the date of exposure. *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

dants' brief invokes the spectre, or sets up the strawman, depending on whose ox is being gored, of forum-shopping,[12] and asserts that Texas has no interest in the application of her longer[13] statute of limitations, citing cases from States which, as a matter of policy, have abandoned the traditional conflicts rule for limitations.[14] These arguments miss the point, however. It is the proper concern of Texas as to what rules best advance her interests, and it is not our role to invalidate Texas' choice of law because we might feel that it will clog the Texas courts with unwanted litigation. The state cases cited by defendants are completely consistent with this rationale; those States have made their decisions and Texas has made hers. Whatever may be the merits of a significant contacts or other similar rule, with respect to limitations of actions, it is better addressed to state courts and legislatures.

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12. There is nothing inherently evil about forum-shopping. The statutes giving effect to the diversity jurisdiction under the Constitution, 28 U.S.C. §1332 (jurisdiction) and §1391 (venue) are certainly implicit, if not explicit, approval of alternate forums for plaintiffs. For example, §1391(a) provides a suit may be brought in the district where all of the plaintiffs or all the defendants reside, or where the cause of action arose; and §1391(c) provides that a corporation may be sued in any district in which incorporated, or is licensed to do business, or is doing business. Thus, complaints about forum shopping expressly made possible by statute are properly addressed to Congress, not the courts. It would require but a short logical step to conclude that the present case is in reality an attack on the venue statutes, a point we do not consider because not raised in the briefs. In any event, we note that state borrowings statutes guard against forum shopping. But that, too, is a legislative matter, but for the States.

13. The defendants recognize the interest of the forum state in application of a *shorter* statute of limitations, but assert that the result should be different when the forum state seeks to apply its *longer* statute. With respect, the logic of this argument escapes us.

14. See, e.g., *Heavner v. Uniroyal, Inc.*, 62 N.J. 130, 305 A.2d 412 (1973) (statute of limitations of the State when the cause of action arises will be used if all parties are present and amenable to the jurisdiction of that State's courts).

Due Process

The defendants' due process claim must likewise fail. It is true that due process, like full faith and credit, puts certain limits on state choice-of-law decisions. See *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930) (due process). *John Hancock Ins. Co. v. Yates* (full faith and credit.) These limits have been applied only to a State's choice of substantive law,[15] however, and none of the Supreme Court cases cited by defendants give any indication that a choice of procedural law implicates the federal Constitution. See, e.g., *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 313 (1981) (choice of substantive law may be restricted by constitution); see also *Yates* and *Dick*, supra (choice of substantive law limited, despite State's label as procedural).

The Supreme Court has repeatedly approved the constitutionality of the rule that the law of the forum applies for limitations purposes. E.g., *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). But defendants assert that none of the Supreme Court cases upholding application of the traditional rule are dispositive of this case, because none of those cases involved the application of a forum State's longer statute of limitations. Nothing in any Supreme Court case, however, indicates that this should make any difference. Virginia has no statute of repose, as contrasted with a statute of limitations, in favor of the defendants here. Had Virginia such a statute of repose, a better argument might be made. Defendants enjoy no right, then, fundamental or otherwise, in having Virginia's limitations' period applied to them. Therefore, the defendants cannot have been deprived of due process on that account by the district court's application of Texas' statute of limitations.

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15. The rule was stated by Justice Brennan in *Hague*, infra, at p. 312-13, "... for a State's *substantive* law to be selected in a constitutionally permissible manner, that State must have a significant contact. ..." (Italics added)

Defendants can claim no surprise at having the Texas statute applied in this case, which was originally filed in Texas. Unfair surprise is at the heart of the due process restrictions on state choices of law, see *Hague* at 326, Justice Stevens concurring, surprise created by an arbitrary choice. It would often be unfair to subject a litigant to the substantive laws of a State with no significant contacts to the litigation, because people are thought to be capable of modifying their behavior in light of the prevailing law. To subject a party's conduct *post hoc* to rules that that party had no reason to expect might apply might truly be unfair. The defendants, though, had every reason to expect that Texas' statute of limitations would be applied to them in an action like this.

It has long been the rule that transitory actions may be filed in any court with jurisdiction over the defendants. An action for personal injury, such as this, is a perfect example of a transitory action. Defendants are bound to have known that by marketing their products in Texas they would subject themselves to the jurisdiction of the Texas courts. And, defendants had no reason to think that, were they sued in Texas, the Texas courts would apply any statute of limitations other than their own. The rule that the law of the forum determines the applicable statute of limitations has a long history in the federal courts,[16] and its application has been widespread. While long usage, by itself, may give little imprimatur to a law challenged as violative of due process, it is most relevant to whether defendants can claim surprise when the rule is applied to them. See *Hague*, at p. 317-318.

Finally, we note that we do not attach the same significance as defendants to the language of the Supreme Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). The full extent of the Court's commentary on the traditional conflicts rule is as follows:

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16. See, e.g., *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839).

> There has been considerable academic criticism of the rule that permits a forum state to apply its own statute of limitations regardless of the significance of contacts between the forum state and the litigation. [Citations omitted] But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation.

Id. at 778 n. 10.

Defendants characterize this as a warning that the traditional rule is ripe for reconsideration. The most we can say, however, is that it indicates that the precise question has not yet been addressed by the Supreme Court. We take the language as we find it, that the Court has expressed no opinion on that matter.

In sum, our opinion is that the rule as applied here does not violate either the due process or full faith and credit clauses of the Constitution. We think the district court correctly followed the mandate of *Klaxon*, that its "... proper function ... is to ascertain what the state law is, not what it ought to be," 313 U.S. at 497, and the concurring opinion of Justice Stevens in *Hague* that "[i]t is not ... [the Supreme] Court's function to establish and impose upon state courts a federal choice-of-law rule. ..." 449 U.S. at 332.

The order of the district court is accordingly

AFFIRMED.[17]

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17. In accord with this opinion are *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987), and *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979). Contra, *Ferens v. Deere & Company*, 819 F.2d 423 (3d Cir. 1987), over a dissent.